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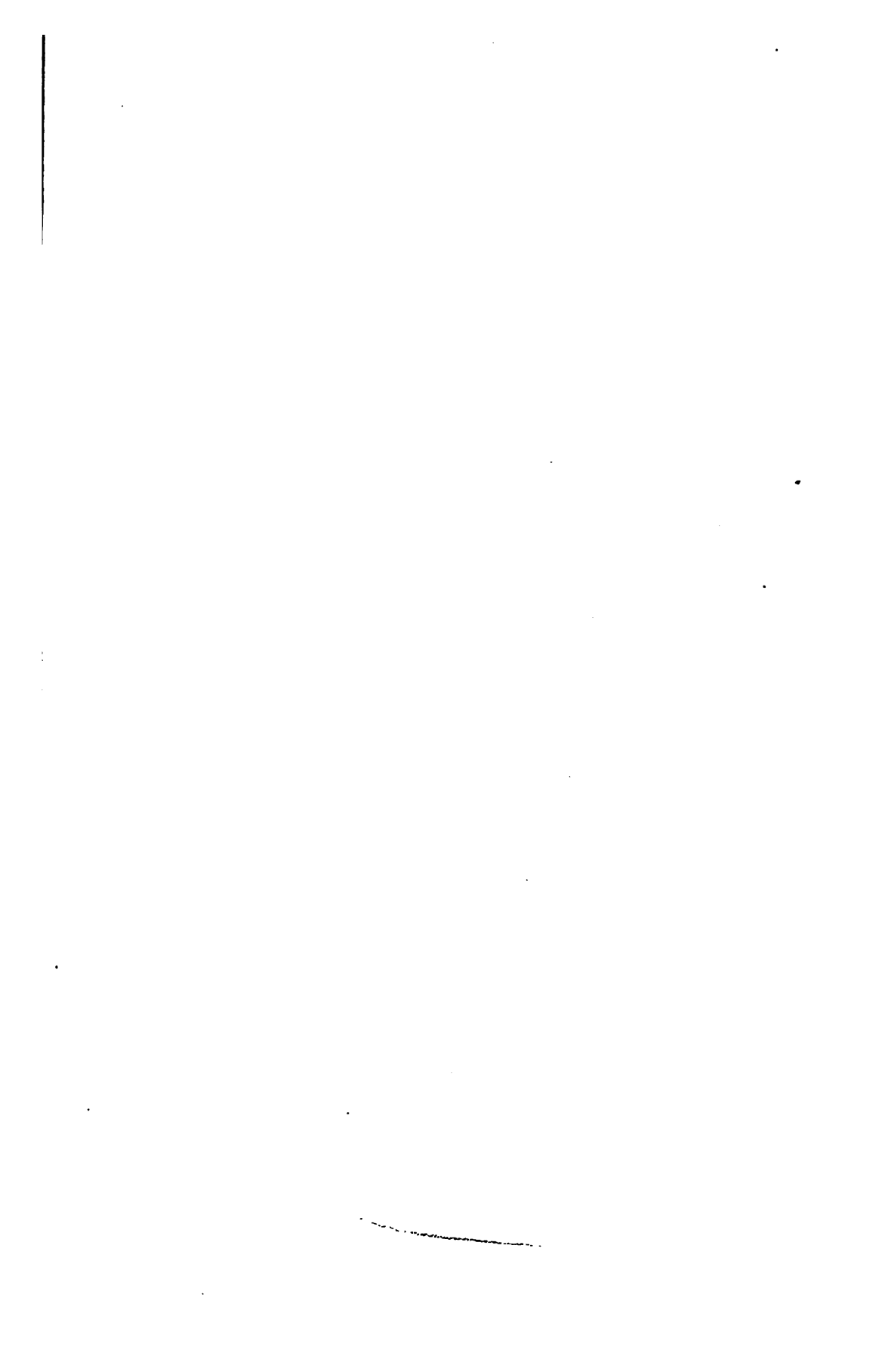
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DIGEST OF THE LAW
OF
RESTRICTIONS
ON THE USE OF
REAL PROPERTY

BY
C. P. BERRY
OF THE ST. LOUIS BAR
AUTHOR OF "LAW OF AUTOMOBILES"

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- § 415. Court will consider future as well as present use of dominant owner's property.
- § 416. As depending upon the degree of injury or annoyance.
- § 417. Benefit instead of damage.
- § 418. That complainant will not be benefited by enforcement of restriction.
- § 419. Pecuniary loss to defendant.
- § 420. Statute of frauds.
- § 421. Statute of limitations.
- § 422. That the restriction is contrary to public policy.
- § 423. That the restriction is in restraint of trade.
- § 424. That the restriction tends to create a monopoly.
- § 425. That the restriction is unreasonable.
- § 426. That the violation is immaterial.
- § 427. That violation is not offensive or a nuisance.
- § 428. When nuisance will not be enjoined.
- § 429. That the restriction is vague and uncertain.
- § 430. Expiration of restriction during pendency of suit or soon thereafter.
- § 431. That defendant was ignorant of restriction.
- § 432. That there is no legal liability.
- § 433. That the improvements made in restricted territory are of little value.
- § 434. That title to property in question is not in defendant.
- § 435. Effect of dismissal of suit for injunction on subsequent action for damages.
- § 436. That a majority of property holders have consented to the violation.
- § 437. Release of restrictions.
- § 438. Effect of breach of the terms of a release.
- § 439. License from state to build as authority to violate restriction.

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RESTRICTIONS ON THE USE OF REAL PROPERTY

CHAPTER I.

NATURE, VALIDITY, CREATION, DURATION, ALTER- ATION AND TERMINATION OF RESTRICTIONS.

- § 1. Nature of restrictions on the use of real property.
- § 2. As a "conveyance."
- § 3. As an encumbrance on real property.
- § 4. As affecting marketable title.
- § 5. Restriction against unlawful use as an encumbrance.
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- § 28. Building restriction imposed with reference to some other building.
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- § 30. Effect of mortgage and foreclosure of restricted premises.
- § 31. Alteration of restrictions.
- § 32. By majority of owners of restricted property.
- § 33. Termination or extinguishment of restrictions.

§ 1. Nature of restrictions on the use of real property.

A valid restriction on the use of land is, as to the person for whose benefit it was imposed, private property, within the meaning of a constitutional provision prohibiting the taking of private property for public use without making just compensation therefor. *Allen v. Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890 (1911). Consequently, when lands on which restrictions are imposed for the benefit of other lands are taken for a public purpose, the owner of the dominant estate is entitled to compensation therefor. 1 Lewis, *Eminent Domain* (3rd ed.) sec. 224.

A mutual covenant whereby a number of adjoining property owners agree that a certain portion of their lots shall be kept open and unbuilt upon, constitutes in each a right of property, and if one of the parcels is taken for a public purpose under the exercise of eminent domain the owners of the right are entitled to compensation therefor. *Ladd v. Boston*, 151 Mass. 585, 21 Am. St. Rep. 481 (1890).

So, a restriction on land was held to decrease the fair cash value thereof for the purpose of taxation. *Lodge v. Swampscott*, ... Mass. ..., 103 N. E. 635 (1913). In this respect the court said: "We also think that the ruling requested by the respondent that the restriction, if valid, did not affect the value of the land for the purpose of taxation was rightly refused. The dominant intention of the statute is that property shall for the purpose of taxation be assessed at its fair cash value considered with reference to all the uses to which it may be put by any owner. In the present case the court found as a fact that 'by reason of this restriction the fair cash value of the land is substantially diminished,' and went on to find the value of the land without and subject to the encumbrance and to fix the amounts for which the tax should be abated accordingly, being, in case there was no encumbrance, \$432 and interest from September 28, 1912, and, in case the restriction

constituted an encumbrance, \$672 and interest from September 28, 1912.

“To assess this property without regard to the restriction would therefore (in view of the finding by the court) be to assess it for an amount in excess of its fair cash value and in violation of the statute. No doubt assessors cannot be compelled to inquire into all the details affecting the title to property, but when their attention is called to matters relating to its value they are bound to pay due regard to them.”

The owners of two adjoining lots conveyed one of them and covenanted not to erect any building on their remaining lot nearer than three feet of the line between the two lots. Held, that the rights under this covenant were property rights in the restricted space and enforceable by injunction without proof of special damage resulting from the violation thereof. *Supplee v. Cohen*, 81 N. J. Eq. 500, 83 Atl. 373 (1912).

§ 2. — as a “conveyance.”

A restrictive covenant as to the use of land is not a conveyance, within the statutory meaning of that term respecting the acknowledgment of conveyances. Of itself it does not grant or convey any estate, and nothing passes or is intended to pass by it. In 1846 a Mrs. Alvord and husband executed an agreement regulating to some extent the erection of buildings on their land. Under the then existing law the husband had, by virtue of his marital rights, the *jus disponendi* of the property until his marital relation ceased. Records showed a proper acknowledge by him of the restrictive covenant, but the certificate as to her was not in conformity to the technical requirements of the statute as then existing, in regard to the form of acknowledge required of a married woman. The court upheld the agreement as imposing restrictions on their land. In this respect the court said: “The objection to the defective acknowledgment is personal to her, because she might at any time have corrected it by a new acknowledgment or deed of confirmation, which by way of ratification would have related back to the time when the act needing confirmation was performed. No intervening right or equity prevents this from being done now if it were necessary, but

it is not. Mrs. Alvord is still living, but has never repudiated the covenant and does not seek to do so. The houses on the block have been built over thirty years, and all in conformity to the covenant. The husband did not die until 1862, and the houses were therefore erected and the agreement consummated during the life of the husband, whose agreement, even regarded as a conveyance, was valid, while he lived, by virtue of his exclusive right of control and of sale. When the covenant was executed the land of the Alvords received a benefit, and on it was created a corresponding charge which, like other charges recognized in equity, becomes effective when declared so by the court. A wife, even under the then existing law, might, by her sole acts, charge her estate in equity under some circumstances in which she had not the power of conveyance. She charged it in this instance. It needed no conveyance or writing, to create the easement, even if the right conferred arises to the dignity of that title. The act or consent of those in interest was sufficient." *Bradley v. Walker*, 27 Jones & S. 334, 14 N. Y. Supp. 315 (1891).

§ 3. — as an encumbrance on real property.

An encumbrance has been defined as "every right to, or interest in the land granted to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance." *Simons v. Diamond Match Co.*, 159 Mich. 241, 123 N. W. 1132, 16 Det. Leg. N. 887 (1909).

All restrictions, obstructions, and impediments, tending to prevent or impair the free use or transfer of real estate may be deemed "encumbrances." *Anonymous*, 2 Abb. N. C. (N. Y.) 56 (1876).

"If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is in law diminished in value and encumbered." *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496 (1910).

Any right existing in another to use the land, or whereby the use of the owner is restricted, is an encumbrance. *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496 (1910).

A restriction on the use of real property constitutes an encumbrance thereon. *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662 (1888); *Foster v. Foster*, 62 N. H. 46 (1882); *Dieterlen v. Miller*, 114 N. Y. App. Div. 40, 99 N. Y. Supp. 699 (1906); *Scudder v. Watt*, 98 N. Y. App. Div. 228, 90 N. Y. Supp. 605 (1904); *Raynor v. Lyon*, 46 Hun (N. Y.) 227 (1887); *Lodge v. Swampscott*, ... Mass., ... 103 N. E. 635 (1913); *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496 (1910).

A restrictive covenant in a deed forming a part of the chain of title to land prohibiting certain buildings to be erected thereon after ten years, and requiring any building not to be nearer the street than adjoining buildings, constitutes an encumbrance. *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496 (1910).

A covenant prohibiting the carrying on of "any noxious, offensive or dangerous trade or business," upon the premises, was held to be one running with the land and constituting an encumbrance thereon. It was declared that such covenant does not merely prohibit nuisances which are unlawful in themselves, but prohibits many trades which are not nuisances *per se*. *Dieterlen v. Miller*, 114 N. Y. App. Div. 40, 99 N. Y. Supp. 699 (1906).

A covenant entered into between owners of adjoining lots, for themselves and all claiming under them, that all buildings erected on such lots should be a certain distance from the front street line, is one that runs with the land and constitutes an encumbrance thereon, and if the covenantor subsequently conveys his lot with the usual covenant against encumbrances, a breach of the latter covenant arises immediately upon the execution of the deed. *Roberts v. Levy*, 3 Abb. Pr. (N. S.) (N. Y.) 311 (1867).

Where the owner of property contracts to convey a clear and unencumbered title thereto, the person contracting to purchase such property cannot be required to accept the same when it is subject to a restrictive covenant against the carrying on thereon of any nauseous or offensive business. Such a covenant not only prohibits the maintenance of a nuisance, but it prohibits the placing on any part of the property of any matter or thing which might prove objectionable to any

person owning land or residing in the neighborhood. It is more than a covenant against the carrying on of an offensive business. It is a covenant against such use of the property as might in any way tend to the annoyance of a neighbor. Such a covenant constitutes an encumbrance upon the property. In such a case the vendee may stand on the strict letter of his agreement, and insist that the vendor convey a clear and unencumbered title, and it is immaterial that the restrictions may enhance the value of the property. *Goodrich v. Pratt*, 114 N. Y. App. Div. 771, 100 N. Y. Supp. 187 (1906).

A covenant in a deed providing that the grantee will not erect or suffer to be erected any structure whereby the view or prospect of the owner of an adjoining piece of property, who was not a party to the deed in question, shall be obstructed, and providing for forfeiture in case of violation to the grantor, for the use of such adjoining owner, was held to constitute an encumbrance on the land of the grantee. *Gibert v. Peterler*, 38 N. Y. 165, 97 Am. Dec. 785 (1868).

The existence of a restriction relating to the erection of buildings on land so as not to interfere with the lights of an adjoining owner constitutes a defect in the title thereto, and under a contract for the sale of such land the purchaser may refuse to complete the contract. *Pemsel v. Tucker*, (1907) 2 Ch. 191, 97 L. T. Rep. 86, 76 L. J. Ch. 621, 71 J. P. 547.

A covenant running with the land required the owner thereof to share equally with the adjoining owner the expense of repairing or building a party wall located between the two premises, and provided that whenever the wall should be rebuilt it should be of the same size and of similar materials as the old. It was held that the covenant constituted an encumbrance on the land, and that under a contract to purchase such land where an inspection of the premises would not disclose the existence of such party wall, the purchaser was not obliged to complete his contract. *O'Neil v. Van Tassel*, 137 N. Y. 297, 33 N. E. 314 (1893).

A covenant on the part of the owner of a town site with the lessee of one of his houses that the lessee should have the exclusive privilege of vending merchandise in the town during the term of the lease, is purely a personal covenant, and

creates no lien or encumbrance on any of the land of either party to the agreement. *Taylor v. Owen*, 2 Blackf. (Ind.) 301 (1830).

A condition in a deed of conveyance to land, that during a period of twenty-five years from its date only one single dwelling-house with outbuildings requisite for the use of same shall be erected on the premises, and that the dwelling-house shall be adapted for the accommodation of one family only, constitutes an encumbrance on the land. *Foster v. Foster*, 62 N. H. 46 (1882).

A restrictive covenant prohibiting the erection of apartment houses on the land, *Altman v. McMillin*, 115 N. Y. App. Div. 234, 100 N. Y. Supp. 970 (1906); or one against certain kinds of buildings being erected on the premises, inserted for the benefit of other land owners, *Kramer v. Carter*, 136 Mass. 504 (1884); or one relating to the character of buildings to be erected on land, *Doctor v. Darling*, 68 Hun 70, 22 N. Y. Supp. 594 (1893); or against selling liquors on the premises granted, *Hatcher v. Andrews*, 68 Ky. (5 Bush) 561 (1869), constitute encumbrances on the land to which they relate.

A conveyance of land was made subject to the "conditions" that "no dwelling house or other building except necessary outbuildings shall be erected or placed on said lot," and provided that no building erected thereon should be less than three stories in height, nor have exterior walls of any other material than brick, stone or iron. Held, to be restrictions instead of conditions, and to constitute an encumbrance on the land. *Ayling v. Kramer*, 133 Mass. 12 (1882).

The fact that the grantor held the land on condition that he should erect a dwelling-house thereon within a certain time, is not a breach of a covenant against encumbrances; such condition not being an encumbrance. *Estabrook v. Smith*, 72 Mass. (6 Gray) 572, 66 Am. Dec. 445 (1856).

It has been held that, where one entered into a contract to purchase land under the belief that he could build on the entire property without any restriction as to height, and thereafter he discovered that the height of the buildings to be erected thereon had been very materially limited by a local municipal act, equity would not enforce specific perform-

ance of the contract to purchase such land, on account of such mistake. *Bray v. Briggs*, 26 L. T. Rep. 817 (1872).

§ 4. — as affecting marketable title.

Where a restrictive covenant appears in the line of title to land, which prohibits the erection of any building thereon within five feet of the street line, a good marketable title cannot be conveyed by the owner under a contract to convey such land free from all restrictions. This was held to be true, although an ordinance of the city in which the land was located, and which was enacted subsequent to the execution of the restrictive covenant, forbade the erection of any building on such land nearer to the street line than five feet. *Coues v. Hallahan*, 209 Pa. St. 224, 58 Atl. 158 (1904).

Where one contracts to purchase land and is not informed by the owner that there is a restriction relating to the character of buildings that may be erected on it, and their location, which may affect its market value, specific performance will not be decreed of such contract. *Shea v. Evans*, 109 Md. 229, 72 Atl. 600 (1909). In this case the court said: "Whatever the effect of such restrictions may actually be, the court cannot say that they will not affect the value of the lots, and Mrs. Evans cannot be required to accept them, subject to the restrictions, in the absence of more satisfactory proof that she had agreed to them, or knew of their existence. Vendors owning lots with restrictions such as these must inform purchasers of them, or see that they are aware of them, if they want courts of equity to enforce such contracts. When a contract for sale of land has nothing more in it than there is in this, a court of equity, if called upon to enforce it by the grantor, will require him to have a good marketable title, and the same principle would demand that it be free from such restrictions that would likely affect its value in the absence of satisfactory proof that it was known by the vendee that the property was to be conveyed subject to them."

The tenants in common of a tract of land entered into a written agreement that they would not erect any buildings, other than dwelling-houses, at least two stories high, of brick or stone, or churches of the same materials, on the lands or

any part thereof, excepting ordinary yard appurtenances, and also restricted the use of the land against certain specified businesses, and the agreement provided further that in all sales, leases or other disposition of the land in question by the parties to the said agreement, purchasers, lessees or occupants should be required to come under and be bound by such restrictions, and that the same should run with the land, and that any party thereto or person aggrieved by any violation thereof might apply for relief by injunction or otherwise. There was a further agreement between the parties establishing a uniform building line, and a provision that such covenant should run with the land and be binding on all future owners, and all deeds executed by the parties, of any of the lots, should be made subject to the conditions of the agreement. Held, to constitute encumbrances, while they were in existence, which prevented the conveyance of a good marketable title to any of the lots covered thereby. *Kountze v. Helmuth*, 67 Hun 343, 22 N. Y. Supp. 204 (1893).

A conveyance of land was made to a church, "to have and to hold the said lot of ground for mission school purposes." It was not provided in the deed that a building should be erected on the lot, and be used exclusively for mission school purposes, nor was any penalty established by which the lot would revert in case of the nonuser of the ground for the purpose named. It was held that under these circumstances, the words "for mission school purposes" did not indicate a clear intent to create a condition, and therefore the plaintiff had a marketable title to the property. *Rankin Regular Baptist Church v. Edwards*, 204 Pa. St. 216, 53 Atl. 770 (1902).

Where land is subject to a covenant that no mill, factory, brewery or distillery shall ever be erected on the land, the owner has not a "good and marketable" title, or a title that is "clear of all encumbrances." *Batley v. Foerderer*, 162 Pa. St. 460, 29 Atl. 868 (1894).

A covenant against the erection of "any slaughter house, coal yard or cow stand, tenement house, tallow chandlery," etc., imposed on a lot of ground, was held not to be a valid objection to the title on the part of one about to purchase the property for the erection of a high class apartment house

thereon. *Ranger v. Lee*, 66 N. Y. Misc. 144, 121 N. Y. Supp. 328 (1910).

§ 5. — restriction against unlawful use as an encumbrance.

While a restriction against the carrying on of any special business on premises constitutes an encumbrance thereon, one against the use of the premises for any unlawful purpose does not. Thus, a restriction against the erection on premises of any building or buildings which would be a nuisance to the adjoining land, imposes no greater restriction than such as the law imposes, and subject to which all property is held. *Floyd v. Clark*, 7 Abb. N. C. (N. Y.) 136 (1879). In the case cited it was said by the court: "It is urged by the purchaser that he may be subjected to vexatious suits upon the condition in question, because of its vague and indefinite provisions. No action can be successfully maintained against him, unless he creates or suffers a nuisance on his land. Against ill-founded prosecutions he could not be assured, even if there were no such condition in the deed. The condition therefore does not increase his liability. It does not create an easement in his lots for the benefit of adjoining owners."

A restriction against the use of a city lot as a cemetery or burying ground constitutes no encumbrance upon the lot where there is either a municipal ordinance or state law prohibiting its use for such purpose. *Floyd v. Clark*, 7 Abb. N. C. (N. Y.) 136 (1879).

It has been declared that if a restriction was merely against the erection of any wooden structure which was already prohibited by ordinance or general law, that such a restriction, reasonable in itself and in harmony with the local law, would not be open to objection as constituting an impediment to a marketable title. *Batley v. Foerderer*, 162 Pa. St. 460, 29 Atl. 868 (1894).

§ 6. Validity of restrictions.

Covenants in the nature of restrictions on the use of real property are, when reasonable and within the policy of the law, valid. *Kenwood Land Co. v. Hancock Investment Co.*,

169 Mo. App. 715, 155 S. W. 861 (1913); *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911); *Thompson v. Diller*, 146 N. Y. Supp. 438 (1914); *Yeomans v. Herrick*, ... Mo. App. ..., 165 S. W. 1112 (1914).

Reasonable restriction on the use of various parcels of a tract of land, imposed for the benefit of the owners of the tract, and for the purpose of making the parcels or lots more desirable for the purpose for which they are intended, and for the advantage of future purchasers of the parcels, are valid and binding. *Walker v. Renner*, 60 N. J. Eq. 493, 46 Atl. 626 (1900).

The dominion which the law gives every land owner over his land, who owns it in fee, invests him with good right and full power, when he conveys a part to impose such limitations upon its use as will prevent his grantee, and those claiming under him, from making such use of the part conveyed as may impair or diminish the value of the part which he retained. The only restriction on this right is, that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190 (1890).

The following extracts from decisions are of interest in this connection:

"It would be a strange doctrine, indeed, to hold that an owner of real estate could not convey a part, and restrict its use in such a manner as not to impair or lessen in value the portion retained. We are aware of no restriction upon the right of an owner to convey upon such terms and conditions as he may see proper, and as may be acceptable to the grantee, except that the right should be exercised with proper regard to public policy, and that the conveyance should not be made in restraint of trade." *Frye v. Partridge*, 82 Ill. 267 (1876).

"It is the settled law of this state that, where a grantor retaining a portion of land out of which the grant is made, enters into an express written understanding with his grantee which restricts the enjoyment of the portion of the land conveyed in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, such restriction will be enforced in equity against the grantee at the

instance of the grantor." *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221 (1906).

It is lawful for parties to contract to abstain from the performance of acts proper and legal in themselves, when others with whom they contract may have an interest in their doing so, and such agreements may assume the form of conditions or restrictions on the use of real property. *Whealkate Mining Co. v. Mulari*, 152 Mich. 607, 116 N. W. 360, 15 Det. Leg. N. 278 (1908).

"It is competent for one granting a portion of his lands to impose restrictions or exact stipulations as to any use or improvement of it which may tend to affect the value, enjoyment or profit of the contiguous lands retained by him." *Phenix Insurance Co. v. Continental Insurance Co.*, 14 Abb. Pr. (N. S.) (N. Y.) 266 (1873).

It has been held in many cases that restrictions are valid as long as they are reasonable and do not unduly impinge upon the right of alienation, and are assented to by the parties. *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911). The owner of real property has the right to restrain its use by his grantees so as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. *Whitney v. Union R. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858).

Such restrictions on the use, being a condition under which the estate is acquired, attaches as an infirmity in the estate itself, and as a privilege or easement in the estate of the grantor, in whose favor the limitation is imposed. If not in restraint of trade or opposed to public policy the restrictions are valid, and pass with the land into the hands of whomsoever it comes, with notice, actual or constructive, of their existence. *Webb v. Robbins*, 77 Ala. 176 (1884).

While such conditions as impose a restraint upon the free use or alienation of real estate are looked upon with disfavor by the courts, and are rather strictly construed, inasmuch as they detract from the free use of the fee simple, and are annoying to owners and intending purchasers, being somewhat at variance, too, with the system in vogue in this coun-

try which regards real estate as an article of commerce, still they are upheld when not repugnant to some plain provision of the law, and are not unreasonable in themselves. *Highland Realty Co. v. Groves*, 130 Ky. 374, 113 S. W. 420 (1908).

The owner of land who sells a portion thereof, may for the benefit of his remaining land, impose any restrictions on the use of the land granted that he may see fit, *Foster v. Foster*, 62 N. H. 46 (1882); *Rowland v. Miller*, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 (1893); subject to the limitation before stated, that they be reasonable and consonant with public policy; and where a vendor of land imposes restrictions on a portion thereof, it is immaterial to their validity that he conveys other land without restriction. *Smith v. Graham*, 147 N. Y. Supp. 773 (1914).

§ 7. — illustrations.

A restriction prohibiting the erection on the land conveyed of any building or buildings except for residential purposes, or to reconvey the property to any person for the erection of a block for commercial business, was held to be valid and binding. *Appel v. Buckbinder*, 82 N. Y. Misc. 312, 143 N. Y. Supp. 710 (1913).

In a case in which it appeared that the owner of a tract of land had conveyed one of the lots therein subject to a restriction that it should be used for dwelling purposes only, and establishing a building line thereon, it was declared that the validity of restrictions of this kind is not open to question. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157 (1912).

A provision in a deed whereby the grantee agreed that neither he nor his assigns should build any fence on a certain part of the premises for a term of twenty-five years, was held to create an easement or servitude, which was enforceable in equity. *Beck v. Heckman*, 140 Ia. 351, 118 N. W. 510 (1908). The same covenant was held not to be unreasonable or contrary to public policy.

Covenants in a deed restricting the character and location of buildings erected on the land conveyed have been held valid and enforceable. *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496 (1910). "I am not aware," said the court in *Bowen v.*

Smith, 76 N. J. Eq. 456, 74 Atl. 675 (1909), "of any policy of law against the creation of such an easement by the deliberative stipulation of the parties in interest. Indeed covenants of this nature have been sustained and enforced when arising only by implication."

Restrictions prohibiting the erection of houses on the land conveyed within twenty feet of the street, are valid. *Russell v. Harpel*, 20 Ohio Cir. Ct. Rep. 127, 10 O. C. D. 732 (1900).

Where the owner of a large tract of land conveys a portion thereof in fee with a covenant in the deed that it shall be used for a residence only, and not for carrying on any trading or mercantile business, such covenant is not contrary to public policy, nor otherwise illegal. *Morris v. Tuskaloosa Mfg. Co.*, 83 Ala. 565, 3 So. 689 (1887).

A restriction in a deed to a lot in a camp meeting grounds prohibiting the erection or use of buildings for stores, boarding-houses, hotels, or stables thereon, without the consent of the camp meeting association, the grantor, is enforceable by injunction. *Winnepesaukee Camp Meeting Assn. v. Gordon*, 63 N. H. 505, 3 Atl. 426 (1885). "The stipulations in the defendant's deed," said the court, "are reasonable, and for a lawful purpose. By accepting a title thus restricted, the defendants understood they were not acquiring an absolute dominion over the lot, but a qualified and limited right of use and occupation, subject to the conditions of the deed."

A provision restricting the use of land to the erection of a dwelling to cost at least twenty-five hundred dollars, and which was required to be built fifteen feet from the street line, was held valid. *James v. Irvine*, 141 Mich. 376, 104 N. W. 631, 12 Det. Leg. N. 454 (1905).

A covenant on the part of grantees made for the benefit of all other purchasers of portions of the same tract of land, not to erect any houses of amusement or entertainment thereon, provided the grantor inserted similar clauses in all deeds to future purchasers, was held to be a valid covenant, not opposed to public policy. *Baltimore v. Garrett*, 108 Md. 24, 69 Atl. 429 (1908).

A covenant on the part of a grantee in a deed not to erect a livery stable on the premises conveyed is not invalid as being

against public policy. *Klassner v. Ehl*, 100 S. W. 255 (1907). In this respect the court said: "Appellant contends that the contract not to erect a literary stable upon the lot is void, as it is unreasonable and a restraint of trade. By the terms of the deed she is not restrained from erecting such buildings in the town of Champaign but only restrained from erecting it upon the lot sold to her. This should be considered as a part of the consideration which induced appellee and his brother to part with the lot."

A corporation was organized to hold land for the purpose of carrying on religious exercises and meetings thereon. It leased a part of its land with restrictive covenants in the leases providing that the lessees "during all meetings would be subject to the rules and regulations of said meeting" and "would use such premises for the purpose of a private dwelling or residence only, except on a special permit from the company." It was held that such restrictions were valid and binding on the lessees. *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576 (1900). In this case the court said: "The parties to these leases had the right to make any restrictions upon the mode of enjoying the leased property which they might agree upon, provided that such restrictions should not be contrary to public policy. . . . The leases were given and received in furtherance of the plaintiff's existence, that is, to keep up religious meetings and literary entertainments and maintain summer homes for those who resorted to the place; and the defendant, in good faith, ought to be bound, not only to the plaintiff, but to the other lessees as well, to carry out the common design. We can see nothing unreasonable in the covenants, and nothing in them contravening public policy."

The fact that an owner of a tract of land adopts a general plan of improvement in respect to only a portion thereof, and imposes restrictions on lots sold therein accordingly, does not affect the validity of such restrictions. Thus, the owner of a subdivision laid it out so as to take in property on both the east and west sides of railroad tracks extending through it, and subsequently abandoned that portion lying west of the tracks and sold it as acre property, improving for residential

purposes that portion lying east of the tracks and conveying lots therein according to such plan. It was held that the right of the purchasers of the lots in the subdivision lying east of the tracks was not affected by the abandonment of that portion west of the tracks. *Fete v. Foerstel*, 159 Mo. App. 75, 139 S. W. 820 (1911).

§ 8. — failure to specify person to be benefited by restrictions.

The owner of adjoining lots, on one of which was his residence, conveyed the second lot "with the restriction and reservation that no building hereafter erected on the above lot shall be erected within ten feet of the easterly line" of the first lot. The sufficiency of the reservation was objected to because "no one is named in whose favor the reservation is made and that this is contrary to the rule that a reservation must be to him who made the deed and not to a stranger, and that there are no words of limitation and inheritance which would make it available to the grantor's heirs and assigns." The court held, however, that whatever the technical appellation should of right be, whether reservation, restriction, or exception, the language of the deed imports the creation of a negative easement for the first lot as a dominant estate over the second. *Herrick v. Marshall*, 66 Me. 435 (1877).

"When this is done," continued the court, "by means of language in a deed which must be held to convey distinctly to the grantee's mind the character of the act which he is to abstain from doing on the land granted, and to identify the lot to which his own is made servient, we do not understand that it is necessary either to name the person who is to be immediately benefited by the clause, or to insert words of limitation or inheritance in order to have his rights pass to his heirs or assigns."

§ 9. — provision in mutual agreement rendering restriction void upon failure of any of the parties to sign.

A number of owners of land entered into an agreement restricting the use of their property, which agreement, among other things, provided: "This agreement between the afore-

mentioned undersigned shall be null and void and not binding upon any of the parties in question, in case any one of the above mentioned property owners shall refuse to agree to its provisions." At the time of the execution of the agreement the land of one of the parties was subject to a mortgage, which was subsequently foreclosed, thereby releasing that piece of property from the restrictive agreement. Held, that the provision in question was intended to render the agreement null and void if any of the property owners declined to become a party thereto or should reject it, and that the existence of the mortgage did not constitute a refusal within the meaning of the agreement on the part of the owner of the mortgaged property to execute the agreement. *Scudder v. Watt*, 98 N. Y. App. Div. 228, 90 N. Y. Supp. 605 (1904).

§ 10. — defectively executed agreement.

A number of owners of lots on the same street agreed that all buildings erected on such lots should be set back seven feet from the street, and that such agreement should be deemed to run with the land, and further provided that the instrument should be of no effect until all parties should have first executed and acknowledged the same. Three of the parties failed to acknowledge the instrument, and the certificate of proof as to them was defective. Eight years thereafter a valid certificate of proof as to such parties was made. During such period, however, eight of the parties conveyed their property without mentioning the restriction. Held, that the agreement was defective on its face and that proof of execution not having been made within a reasonable time, nor until after a majority of the signers conveyed without recognizing the validity of the restriction, the making of the valid certificate after the lapse of eight years was of no avail. It was further held that the observance of the restriction after it had been disregarded for eight years and the voluntary placing of the buildings in conformity therewith, was not sufficient to render the restriction obligatory. Nor was such recorded instrument sufficient to give notice of any valid restriction, since it disclosed at the same time its own insufficiency. *Schefer v. Ball*, 53 N. Y. Misc. 448, 104 N. Y. Supp. 1028 (1907).

§ 11. — where no one has an interest in the restrictions.

Executors of an estate were empowered to buy and sell land, and in conveying portions of such estate, where neither they nor anyone interested in the estate had any adjoining property, inserted a covenant against carrying on of offensive trades on the premises, which covenant was made to run to their heirs. Held, that the provision was void as the executors had no heirs, and if the provision had been inserted for the benefit of third persons owning property in the vicinity, it was void as having no consideration to support it. *Richter v. Distelhurst*, 116 N. Y. App. Div. 269, 101 N. Y. Supp. 634 (1906).

§ 12. — restriction executed by one tenant in common.

There is nothing in the relation of tenants in common to prevent one of them binding himself to employ his interest in the common property only in a certain way, or to certain ends, or covenanting with the other that he will not do certain things, with or in respect of the estate. *Fullington v. Kyle Lumber Co.*, 139 Ala. 242, 35 So. 852 (1904).

§ 13. — covenant to sell only specified brand of beer on premises.

Covenants, founded on sufficient consideration, binding the covenantor to sell only a specified kind or brand of beer on the premises in question, are held to be valid. Such covenants are generally contained in leases of premises owned by brewing companies, or in mortgages taken to secure loans made by brewing companies to saloon keepers, and binding the latter to sell on such premises only beer manufactured by the brewery making the lease or loan.

Where a lessee covenants in the lease not to purchase beer of any manufacture except that of the complainant injunction will lie to restrain the purchase of beer in violation of such provision. *Anheuser-Busch Brewing Assn. v. Dwyer*, 150 Ill. App. 315 (1909).

And the fact that the particular kind of beer specified as being the only kind to be sold on the premises by the lessee, cannot be lawfully obtained, does not affect the restrictive

clause of the lease, when the fact that such beer could not be lawfully obtained was known to both parties when the lease was made. *Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 110 N. W. 746 (1906). In this case the court said: "The contract itself contains no clause expressly requiring the plaintiff to furnish beer to the defendant. It merely fixes the price which the defendant will pay for the beer as the plaintiff may furnish to him. If, as the defendant contends, the plaintiff cannot lawfully make a sale of beer in the city of Omaha, and cannot be lawfully licensed to make such sale, both parties must be presumed to have been aware of that fact when the contract was made, and to have contracted with reference to it. In other words, if the defendant's construction of the license law be correct, he knowingly bound himself to sell no beer on the premises, save such beer he could not lawfully obtain. The suit is not to compel him to buy beer contrary to law, but to restrain him from selling beer contrary to the terms of his lease. It would have been perfectly competent for the parties to stipulate that no beer whatever should be sold on the premises. It was equally competent for them to provide that no beer, except of a particular kind or quality, should be sold thereon. And, if it turns out that the beer excepted from the restrictive clause cannot be obtained, especially where the parties, at the time they made the contract, knew that it could not be lawfully obtained, that fact would not operate to annul the restrictive clause."

§ 14. — restrictions against the sale of intoxicating liquors.

A covenant not to use premises for the purpose of vending thereon of spirituous liquors, is not contrary to public policy, is not immoral, nor is it in restraint of trade or commerce. *Hatcher v. Andrews*, 68 Ky. (5 Bush) 561 (1869); *Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363 (1885); *O'Brien v. Wetherell*, 14 Kan. 616 (1875).

A covenant restricting against the use of property for "bar-room, lager beer saloon, restaurant, ale house, liquor saloon, store, warehouse, or any erection known as nuisances, or any noxious or dangerous use, purpose, trade, business or estab-

ishment, or for any business purpose whatsoever," will be enforced against one maintaining a restaurant and drinking saloon in violation thereof. *DeLima v. Mitchell*, 49 N. Y. Misc. 171, 98 N. Y. Supp. 811 (1906).

A restriction in deeds to town lots prohibiting the manufacture or sale thereon of intoxicating liquor as a beverage on pain of forfeiting the estate, which was imposed in furtherance of a general scheme to prohibit the manufacture and sale of liquor within the town, is valid. *Judd v. Robinson*, 41 Colo. 222, 92 Pac. 724, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018 (1907).

The owners of a townsite conveyed the lots therein with covenants in the deeds prohibiting the sale of intoxicating liquors thereon. This was done for the purpose of keeping the traffic under control, and not for the purpose of prohibiting such sales. In pursuance of this policy the owners granted temporary leases or permission by virtue of which liquor was sold on certain lots. It was held that the restriction was valid and enforceable, and did not constitute an unlawful restraint of trade. *Whealkate Mining Co. v. Mulari*, 152 Mich. 607, 116 N. W. 360, 15 Det. Leg. N. 278 (1908). "In this case," said the court, "the effort was to restrict and not prohibit the sale of liquor, and the question presented is whether it is lawful for the owner of a plat to prohibit, within certain territory, the sale of liquor by others, and in effect, by a condition annexed to the sale of property by himself, provide that others than himself shall not engage in a particular business on the property. We see no reason for holding that such an engagement is unlawful."

An agreement prohibiting the sale of intoxicating liquors upon a certain lot is not contrary to public policy as being in restraint of trade, nor does it tend to create monopoly. *Sullivan v. Kohlenberg*, 31 Ind. App. 215, 67 N. E. 541 (1903). It cannot be said that a contract prohibiting one person and his assigns from selling liquor upon a single lot would confer the power to obtain a monopoly in the business. The contract contained no general restraint upon the right of the parties to engage in the liquor business.

A condition in a deed against the manufacture or sale of

intoxicating liquors as a beverage at any place of public resort on the premises, and providing for forfeiture of the estate granted in case of violation of this provision, was held not to be subversive of the estate conveyed, nor unlawful, nor against public policy, but, on the contrary, to have been imposed in the interest of public health and morality. *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547 (1879).

A deed of conveyance was made upon the condition that the grantee, his heirs and assigns, should not, at any time, manufacture or sell, to be used as a beverage, any intoxicating liquor, or permit the same to be done, on the premises, unless the grantor, his heirs or assigns, should sell other land in the same village without such restriction, or should himself manufacture or sell, or permit on his lands in the same village, to be manufactured or sold, such liquor to be used as a beverage. Held, that the condition was a valid one, not repugnant to the grant. *Plumb v. Tubbs*, 41 N. Y. 442 (1869). In this respect the court said: "It is said that a condition which avoids a grant on account of the sale of a single glass of beer, is unreasonable and absurd, and therefore, void. It is said that a condition forbidding the keeping of a hotel or a saloon, where liquors are regularly sold, might be valid, while one depending upon the sale of a single glass of liquor, would be trifling and ridiculous, and could not be sustained. The grantor in the present case, evidently belonged to that class of men, who consider the habitual use of intoxicating liquors, as a serious evil. He was the owner of a tract of land, which, as I infer from the case, he purposed to have formed into a town or village, by the sale of lots to individuals who should build upon them. This would give to his property remaining unsold, the advantage of the enhanced price, resulting from such improvement. The increase of inhabitants would give to himself and family the benefits of refined society. It was his opinion as we may infer from his restrictive conveyances, that intemperance was a social evil, from which he desired to protect himself and his family. We may infer, in the same manner, that he considered his remaining property as more valuable if located in a community where no liquor was sold as a beverage, than where its use was permitted. These views

and wishes cannot be pronounced unreasonable and absurd. The grantor had a right to hold them, and he had a right to use his property in a manner that would accomplish them. Few men would object to the sale of a single glass of liquor as a beverage, if that were the end of it. The argument is made by the grantor that one sale or one glass leads to another, and that the only way to prevent excess, is entirely to prevent its use. He argues that there is no limit which can be placed upon its sale or use which will permit its moderate use, and which will insure that such use shall not become immoderate. To accomplish, therefore, his purpose of preventing intemperance, which he fears may reach his own family; which he apprehends may increase taxation; which he thinks will depreciate the value of his remaining property, he determines to adopt a method, which must certainly be effectual. He imposes a condition, that no intoxicating liquor in whatever form, or to whatever extent, shall be sold upon the premises granted. If faithfully observed, this condition would certainly produce the result desired by the grantor. Whether this plan is wise or unwise, is not for us to say. No man is bound by law to be wise. He has a legal right to be wise or unwise, in his own judgment or as his own caprice may determine. It is enough here to say that neither the purpose of the grantor, or his mode of accomplishing it can be pronounced unreasonable or absurd."

A conveyance of land which precludes the sale thereon of intoxicating liquors, if clearly imposed by the terms of the conveyance, will be enforced by injunction. *Guyer v. Auers*, 132 Ill. App. 520 (1907). In this case the appellee insisted that the reservation against the sale of liquor was against public policy, monopolistic, void, and an interference with the functions of the municipality of East Moline, in which city the land was situated. In this respect the court said: "While a municipality has the sole right to issue a municipal license for the sale of liquor, it does not furnish a place for such sale. An applicant for a license must furnish the location. If he does not possess the right to sell liquor on the premises, the license cannot give him such right. The owner of a building cannot give the right to sell liquor therein, but the

consent of the owner and the license from the municipality are prerequisites to the right to keep a dram-shop. Appellant can neither license the sale of liquor nor give the right to sell without a license. . . . The restriction in no way interferes with the functions of the municipality, but appellee has received the premises subject to conditions for the effect of which he can only blame himself."

In respect to the contention that the restriction was opposed to public policy, the court said: "Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. The public policy of the State of Illinois in respect to the liquor traffic is in effect to tolerate the traffic under severe restrictions and heavy burdens calculated to prevent rather than to encourage the traffic. The law of this state, as announced in the decisions of the Supreme Court from the earliest reports to the most recent, recognizes the universal fact that evils do arise from such sales, denounces such evils and recognizes them as a proper subject for police regulation and for restriction. . . . Restrictions on the liquor traffic are not governed by the same rules as the same restrictions would be when applied to the ordinary and legitimate avocations of life. Restrictions on the liquor traffic are in the interest of good government, good morals and good order, and mitigate crime, misery, want, beggary and vice, evils which the liquor traffic fosters. From an early period in civilization in all countries the unrestricted sale of such drinks has been regarded as pernicious. These restraints are not like such as restrict the ordinary avocations of life, which advance human happiness or trade and commerce, that neither produce immorality nor suffering and want. This business is, on principle, within the police power of the state, and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits. As the law declares the sale of intoxicating liquor to be a public evil, a contract preventing the sale of liquor is valid and cannot be considered against public policy."

§ 15. — covenant with one's self.

It has been held that a covenant by one with himself and others jointly is void. Consequently, if a lessee attempts to covenant with himself and other lessors jointly, although the covenant if valid would run with the land, an assignee of the lease is not bound at law or in equity thereby. *Napier v. Williams*, 55 Sol. Jo. 235, (1911) 1 Ch. 361.

In this respect the court said: "The lessee is already seised *per my et per tout*, and the demise by the lessee himself can have no effect, for any terms granted by himself would merge in the fee. The other two joint tenants could make an effectual demise of their two-thirds, but they would thereby sever the joint tenancy. I think that the effect must be that the joint tenancy is severed during the term, and that the lessee is entitled to the two-thirds of the land by virtue of the lease, remaining seised of his one-third for his original estate in fee. If this is the right view I can see many serious difficulties in the plaintiff's way, but I prefer to dispose of the case on other grounds, and will therefore treat the matter as if there was no question arising on the form of the demise itself."

"I am of opinion that at law the covenants in question were void, and could not have been enforced against the covenantor. But it is contended that though that might be so, the provisions they embody are a burden on the land, and bind the assignee by reason of the privity of estate between him and the lessor. It is true that in general a lessee's covenant of the nature of those in question runs with the land, and the assignee can be sued by the reason of the privity of estate between the parties. Privity of estate is an essential condition of the liability, but it does not create it. This is only effected by the covenant. If there is no covenant there can be no liability. At law, then, I think the plaintiff's case ought to fail. Have they any better right in equity? It may be conceded that the relations between the lessee himself and his co-trustees and the beneficiary, and the circumstances under which the lease was granted, would render him liable to perform the obligations which the lease purported to confer upon him. The assignee must, no doubt, be treated as having notice that the lessee was a trustee, and that the lease was granted

in pursuance of the will. To impose on the assignee a personal liability by reason of notice is a totally different matter. There is no principle and no authority by virtue of which it could be imposed in such a case as the present. In my opinion, therefore, neither at law nor in equity could the performance of the so-called covenants be enforced by action against the defendant."

§ 16. — in conveyance to municipal corporation.

All who contract with a municipal corporation are charged with notice of the extent of its powers and of the powers of its officers and agents with whom they contract. 4 McQuillin, Mun. Corp., sec. 1902.

If a municipal corporation has no authority to accept a conveyance of land with restrictions imposed upon its use, such restrictions are void, as the grantor is chargeable with knowledge of such want of authority. *Ecroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741 (1898).

It has been held that building restrictions may bind a city as well as an individual. "We are satisfied," said the Supreme Court of Michigan, "that a valid building restriction may be binding upon a city as well as an individual, and, before it can use a lot charged with such restriction for a purpose prohibited by the restriction, it must obtain by purchase or condemnation the title of all owners of any interest therein, and, when it has not done so, equity may properly intervene to preserve the *status quo* until such interests are acquired. *Allen v. Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890 (1911).

§ 17. — in conveyance by municipal corporation.

One who purchases land from a municipal corporation takes it with full knowledge of the power of the corporation to convey. It may be that the corporation has power to convey its lands by unencumbered title, and at the same time not have the power to impose restrictions on one portion for the benefit of another portion, or to establish a general scheme whereby each purchaser of parcels of the land has the right to enforce observance of restrictions imposed on all of the parcels.

In *Davis v. Leicester*, 70 L. T. Rep. 599, 63 L. J. Ch. 440 (1894) 2 Ch. 208 42 Wkly. Rep. 610, 7 Reports 609, it seemed that the corporation of Leicester desiring to dispose of some lots owned by it, secured proper authority to dispose of them, but it then formed a general plan, and imposed restrictions on the lots, intending that each purchaser should have the right to enforce observance by any or all other purchasers. It had not, however, secured proper authority for imposing such restrictions on the lots, and it was held that one who purchased some of the lots with the understanding of the general scheme, acquired no right relative to the restrictions attempted to be imposed in such manner.

§ 18. — as being in violation of the rule against perpetuities.

A restrictive covenant or contract, not being a limitation of property, is not obnoxious to the rule against perpetuities. *Mackenzie v. Childers*, L. R. 43 Ch. Div. 265, 62 L. T. Rep. 98, 59 L. J. Ch. 188, 38 Wkly. Rep. 243 (1889).

An eminent writer on the Rule Against Perpetuities, in speaking of restrictions on the use of real property, says: "The rights thus created are sometimes called equitable easements; they are present interests, and are no more subject to the rule against perpetuities than are common law easements. 'There seems some difficulty in understanding the objection to such a modified enjoyment of property on the ground of its supposed tendency to perpetuity.' " Gray, Rule Against Perpetuities, sec. 280.

"Restrictions and conditions" in a deed as to the class of buildings to be erected on the land, a breach of which, it was expressly provided, should not work a forfeiture of the estate, are not conditions, but restrictions which are valid, although unlimited as to time. *Tobey v. Moore*, 130 Mass. 448 (1881).

A deed imposing restrictions on the use of property, which provided that after the expiration of twenty-five years from date of the deed, by consent of a majority of the then owners of the lots, such restrictions may be abolished, is not objectionable as creating a perpetuity, which is created only where there are no persons who can convey an absolute fee in pos-

session discharged of a future use or estate. *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911).

§ 19. — effect upon restrictions of title by adverse possession.

A title acquired by adverse possession is not paramount to, and does not destroy the equitable right of persons entitled to the benefit of prior restrictive covenants to enforce them against the land. *Re Nisbet & Potts' Contract* (1905) 1 Ch. 391, 53 Wkly. Rep. 297, affirmed in (1906) 1 Ch. 386.

In the case cited it was said by Justice Farwell: "The burden of these restrictive covenants is not incident but paramount to the estate of the dispossessed owner, and all that the Act extinguishes is the right and title of the person who fails to make an entry or bring an action for the recovery of the land in question. The right to enforce these covenants was no part of his title, nor is such right within the Act at all, for it is obvious that the person entitled to enforce them cannot do so by making any entry or distress or bringing any action to recover land. On the contrary, his action proceeds on the assumption that the land is and will remain in the possession of the tenant. The real analogy is not to a lessee's covenants but to rights of way and similar easements. If a trespasser acquires a statutory title to land over which such easements exists he cannot plead the statute of limitations to persons seeking to enforce them, but must show extinguishment by abandonment or otherwise like any other land owner."

§ 20. — restrictions must be supported by consideration.

Restrictive covenants are merely contracts and, like all contracts, must be supported by sufficient consideration. However, the conveyance of the property is a sufficient consideration for a restrictive covenant entered into by the grantee. *Walker v. McNulty*, 19 N. Y. Misc. 701, 45 N. Y. Supp. 42 (1897).

The release of a right of re-entry for breach of a condition subsequent, has been held to be sufficient consideration for the imposition on such land of restrictions on its use, although there was some doubt as to the validity of the clause giving

the right of re-entry. *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591 (1909).

In a case where it appeared that executors of an estate who were empowered to buy and sell real estate, in conveying property of the estate where they or anyone having an interest in the estate owned no property in the vicinity, inserted a provision against offensive trades in the conveyance, if considered as having been intended for the benefit of third persons owning adjoining premises, was void as having no consideration to support it. *Richter v. Distelhurst*, 116 N. Y. App. Div. 269, 101 N. Y. Supp. 634 (1906).

A brewing company advanced money to enable the borrower to build a saloon, and took back a mortgage in which it was provided that the mortgagor shall not, for a period of twelve years, sell upon the mortgaged premises any beer, ale, or porter except that manufactured by the mortgagee. Held, that the agreement was founded upon a valuable consideration. *Cleveland & Sandusky Brewing Co. v. Demko*, 29 Ohio Cir. Ct. R. 102 (1907). "We have no difficulty," said the court, "in finding that this agreement was upon a valuable consideration. The original advance of thirty-seven hundred dollars by plaintiff to the defendant was sufficient consideration for his agreement to pay interest, buy beer of the plaintiff for twelve years, and not sell beer of any other brew for twelve years."

A consideration stated in an agreement imposing restrictions on the land of one of the parties thereto to be one dollar, and the discontinuance of certain litigation pending between the parties, constituted sufficient consideration for the imposition of the restrictions. *Wootton v. Seltzer*, ... N. J. Eq. ..., 90 Atl. 701 (1914).

§ 21. — mutual covenants.

The owners of adjoining lots may enter into mutual covenants restricting the use and enjoyment of their respective premises, with a view to the permanent benefit and the advancement in value of each. Such mutual and reciprocal covenants of the contracting parties constitute sufficient consideration for the covenants and agreements of both. "All

that is required, when the undertaking of one of two contracting parties gives the consideration for the undertaking of the other, is that there should be mutuality; covenants or undertakings by each, that each should come under some obligation, or release some right to the other; but a perfect reciprocity in the undertakings, or equality in the obligations assumed or rights released, is not involved in or essential to the sufficiency of the considerations. Equality is not of the essence of mutuality. It suffices that some promise or covenant has been made, or some right been given up; and the adequacy of the same, as a consideration to support the undertaking of the other party, in the absence of fraud, is for the parties to determine. A covenant is well supported in law and in equity by any consideration, however slight." *Trustees of Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615, rev'g. 39 N. Y. Super. Ct. (7 Jones & S.) 372 (1877).

The mutuality of an agreement between lot owners in a subdivision whereby they imposed a building restriction on their property and agreed to observe the same, constitutes a sufficient consideration for the agreement, although all of the owners in the subdivision did not sign. *Erichsen v. Tapert*, 172 Mich. 457, 138 N. W. 330 (1912).

The owners of rights on adjoining premises to operate thereon for petroleum oil and gas entered into an oral agreement, for the purpose of operating their respective properties amicably, to preserve the rights of each with respect to the dividing line between the two properties, and to avoid increased expense and probable loss and damage, not to drill or construct any oil or gas wells on either of said properties within two hundred feet of the dividing line. Held, that the promise of one was a sufficient consideration for the promise of the other, and that the consideration passing was both good and valuable. *Ware v. Langmade*, 9 Ohio Cir. Ct. Rep. 85 (1894).

§ 22. Creation of restrictions.

Ordinarily restrictions on the use of real property are created in deeds and leases, but quite frequently they are contained in separate instruments. Sometimes they are cre-

ated by estoppel, in which instances they are not, of course, to be found in writing. What constitutes restrictions for certain purposes, what is included in certain language constituting restrictions, and the construction generally of restrictions, are questions treated throughout this work.

“The manner in which a restriction limiting the use of land is created may be by reservation in the deed, by a condition annexed to a grant, by a covenant, or even by parol agreement of the grantees. When created by covenant it runs with the land. Whether it runs with the land or whether it is an easement is immaterial, provided the creation of the restriction is clearly defined and is understood by the parties at the time.” A plan or map of a platted tract of land, showing a dotted line across all the lots adjoining a certain street with the words, “Fifteen foot building line,” on or just above such line, does not, of itself, create a valid, unlimited building restriction prohibiting the erection of buildings nearer the street than fifteen feet. *McCloskey v. Kirk*, ... Pa. St. ..., 90 Atl. 73 (1914).

A recital in a deed that the premises are conveyed “subject to the restrictions, if any now exist,” contained in a previous deed to the premises, does not create or impose restrictions on the premises if none are contained in the deed referred to, but must be taken as inserted as a mere precaution. *Donahoe v. Turner*, 204 Mass. 274, 90 N. E. 549 (1910).

Restrictions may be created on a division and conveyance in severalty to different grantees, of an entire tract. *Allen v. Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890 (1911).

Owners of property who described themselves as “owners of one or more lots in the Chandler avenue subdivision described as lots 50 to 74, both inclusive, situate on the north side of said Chandler avenue, and also lots numbered from 25 to 49, both inclusive, situate on the south side of Chandler avenue,” entered into an agreement not to erect any other than a single dwelling house on each lot. Held, that it was not necessary that the owners of all the lots sign the agreement before it should become binding on those who did sign. “Nowhere in the contract,” said the court, “does it appear

that the owners of the lots described (numbered from 25 to 74) must sign the contract before it shall become operative or binding on those who did sign. Moreover, the testimony in the case clearly shows, when the contract was circulated among the lot owners, those who signed were advised that it was not thought possible to secure the signatures of all those who owned lots in the specified area. *Erichsen v. Tapert*, 172 Mich. 457, 138 N. W. 330 (1912).

The owner of land laid it out into streets, squares, and lots, some of the latter being for building purposes, some for public purposes, some for churches; according to a plan. At the time of selling some of the building lots at auction it was proclaimed that they were sold according to that plan. About ten months later the owner conveyed a lot to the Baptist church, which was marked on the plan for that purpose. No mention of the plan or any restrictions was made in any of the deeds. No one was at the auction of the lots representing the church. The Baptist church erected a house of worship on its lot, and later advertised a part of the lot for sale. This for the purpose of raising money to build a better house on another part of the lot. Certain lot owners commenced an action to prevent the church selling the land, claiming an easement in the lot that it was never to be used for any purpose than that of a place of worship. Held, that the facts were insufficient to give them the easement claimed. *Chapman v. Gordon*, 29 Ga. 250 (1859).

The court said: "Are they (referring to the facts) materials out of which such a title is deducible? They consist merely of the sayings of Griffin, at the auction. And first, how are those sayings to be understood? As importing this: 'I' (the vendor) 'now sell these lots, according to this plan which I hold in my hand, and I bind myself, that, as the lots, streets, and squares, now stand in the plan, so shall they forever stand in the city, like a petrified forest?' Or, as importing this: 'I now sell these lots, according to this plan which I hold in my hands and I suppose that the city will remain according to the plan, but I make no warranty, as, what I say is but matter of opinion.' The sayings are certainly susceptible of the latter import. And that is a natural and rea-

sonable import, whilst the other is extravagant and unreasonable. Subsequent conduct of all parties favors the notion, that this was the import. If the first was the import, it was a matter making a part of the contract of purchase, and a most important part, and therefore it was a matter that should have entered into all the deeds made to purchasers, seeing that the statute of frauds requires agreements conveying land to be in writing. Yet there is no such matter in any of those deeds. They, so far as appears, were deeds conveying unconditional fees, to each purchaser, to the lot he purchased, and conveying to him nothing in the lots purchased by others. This of itself is strong, to show that Griffin was understood as not speaking the language of a contract but as speaking the language of mere opinion."

The fact that restrictions are created in an instrument other than the deed conveying title to the premises is of no consequence, as long as there is a valuable consideration moving to and from the signers. *Erichsen v. Tapert*, 172 Mich. 457, 138 N. W. 330 (1912).

It is not essential to the right of a grantee of land to enforce against his grantor a covenant of the latter that he will not build on his remaining land except in a specified manner, that it be embodied in and form a part of a deed of conveyance from the covenantor to the covenantee. A mutual agreement between two property owners on a given street, for the purpose of establishing and maintaining a building line, wherein the parties engage to bind themselves and their land to the observance of the building line, is enforceable in a court of equity against either at the instance of the other. *Wootton v. Seltzer*, ... N. J. Eq. ..., 90 Atl. 701 (1914).

The wife of one of several tenants in common is not a necessary party to an agreement made by her husband with the other owners restricting the nature of the buildings to be erected upon the property and the use to be made thereof, for during the husband's life her interest is inchoate. *Goodhue v. Cameron*, 142 N. Y. App. Div. 470, 127 N. Y. Supp. 120 (1911).

It is held that a restriction cannot attach as an easement in favor of land owned by two tenants in common, where only

one of them is a party to the conveyance. *Hazen v. Mathews*, 184 Mass. 388, 68 N. E. 838 (1903).

An owner of land may ratify a restrictive agreement executed by his attorney in fact, and convey the property subject to the restriction. *Goodhue v. Cameron*, 142 N. Y. App. Div. 470, 127 N. Y. Supp. 120 (1911).

§ 23. — oral representations.

In order to be binding on, or to constitute an equitable estoppel as against a person making them, representations must be of an existing fact, condition or relation. Promises or undertakings, prospective in their character and obligation, do not constitute such an estoppel. Hence, oral statements and promises made by the vendor of real property, during the negotiations for its sale, as to the use to which he would put his adjoining property in the future, do not estop him from putting the property to uses in violation of such statements and promises. All previous negotiations and statements are merged or superceded by the contract and deed afterwards executed, and if not contained therein are not binding upon him. *Musgrave v. Sherwood*, 54 How. Pr. (N. Y.) 338 (1878).

In a New York case the rule was laid down that the owners of land could place restrictions on its use by parol contract with the purchasers of successive parcels, and by such a contract affect the remaining parcels with an equity requiring them also to be occupied in conformity with the plan. Such a restriction is binding on a subsequent purchaser with notice of the fact, although his legal title be absolute and unrestricted. *Tallmadge v. East River Bank*, 26 N. Y. 105 (1862).

The owner of lots on both sides of a street made a plan showing the street as widened a distance of eight feet on each side. Subsequently to several purchasers of different lots he represented that buildings on all the lots were to be erected eight feet back from the street. A number of purchasers erected buildings in conformity with this plan, although the deeds of conveyance contained no restrictions on the occupation of the lots. It was held that a subsequent purchaser of one of the lots, who had constructive notice of the restrictions, would not be permitted to build nearer than eight feet from

the street. *Tallmadge v. East River Bank*, 26 N. Y. 105 (1862).

If plaintiffs, purchasers of lots in a subdivision, were induced to purchase their lots by representations by the grantors that the entire tract would be sold subject to the same building restrictions as were imposed on their lots, equity will protect them against the grantors, and also against subsequent purchasers having knowledge that they were so induced to purchase; and they may require the grantors and such subsequent purchasers to conform to such restrictions. *Schermerhorn v. Bedell*, 163 N. Y. App. Div. 445, 148 N. Y. Supp. 896 (1914).

It will probably be found that wherever the sale of a portion of a vendor's land is made upon the false representation that the remainder of his land is subject to certain restrictions, he will not thereafter be heard to deny such fact.

§ 24. — estoppel to deny restrictions.

An owner of land who sells a part thereof under the false representation that his entire tract is restricted to the same extent that he restricts the parcel sold, thereby restricts the use of the remaining portion of his land to that extent. By his representations the owner affects the remainder of the land with an equity which requires it also to be occupied and improved in conformity with his representations, and this equity is binding upon a subsequent purchaser of the remaining land who has notice of the agreement, though his legal title be unrestricted. The rule applied in cases of this kind rests upon the doctrine of estoppel, which declares that, where a person, by his declaration or conduct, has induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission, if the consequence would be to work an injury to such other person, or to some one claiming under him. *Bimson v. Bultman*, 3 N. Y. App. Div. 198, 38 N. Y. Supp. 209 (1896).

The owner of a tract of land sold a lot therein and at the time represented to the purchaser that the entire block, including all the land owned by him, was restricted against the erection of tenement or apartment houses, stores, and saloons,

and to the same extent restricted the use of the lot in question when he conveyed it to the purchaser. Held, that the remainder of the grantor's tract was thereby subjected to similar restrictions, binding on the owner and all taking with notice. *Turner v. Howard*, 10 N. Y. App. Div. 555, 42 N. Y. Supp. 335 (1896).

In this case, testimony of the plaintiff's husband who acted for her in the purchase of the lot, that "Mr. Howard told me that the entire block was restricted against any nuisance whatever; that nothing but a private dwelling could be erected on that or the other lot,—not only the piece of property that I contemplated purchasing, but upon the entire block; otherwise, I would not have bought in that neighborhood," was held sufficient to support the case.

The owner of a large tract of land divided it into building lots, and circulated maps of the tract on the reverse side of which was a statement that "all buildings must be brick or stone; no frame." A similar statement was on signs erected at three different places on the property, and officers of the owner orally made such statements to certain grantees, who covenanted in their deeds not to build frame houses. It was held that these were representations of an existing fact relating to the property, of the same character as a representation as to a dividing line or a boundary of land conveyed, and that the owner and the grantees of other lots with notice of the restrictions in the deeds to earlier grantees, were bound thereby, being estopped from denying their truth. *Bimson v. Bultman*, 3 N. Y. App. Div. 198, 38 N. Y. Supp. 209 (1896). Under these circumstances a court of equity will enjoin the grantor from building on his remaining land in violation of his representations.

Where a mortgagor of land platted it and sold lots thereof discharged from the mortgage lien and subject to uniform restrictions respecting the kind and location of buildings to be erected thereon, the mortgagee, who acquired title by foreclosure to the remaining lots, was held not to be estopped to deny that his lots were subject to the same restrictions as the lots conveyed because he was general manager of the mort-

gagor, as he was not interested in such company, and his acts in respect of the land were controlled by the board of directors. *Sullens v. Finney*, ... Md. ..., 91 Atl. 700 (1914).

§ 25. — implied restrictions.

It has been judicially declared that there are no implied rights arising from restrictive covenants, and that such covenants are not to be extended by implication. *Crofton v. St. Clement's Church*, 208 Pa. St. 209, 57 Atl. 570 (1904). Also, that equity will not raise an implied covenant in restraint of the beneficial use of property. *Brugman v. Noyes*, 6 Wis. 1 (1857). Again, that if no restriction is imposed upon the use of an estate by a deed, none will be implied under an alleged independent agreement unless such agreement is clearly established. *Hubbell v. Warren*, 90 Mass. (8 Allen) 173 (1864).

A deed of conveyance contained the following provision: "Together with the right to said grantee to keep and maintain windows and openings in the east wall of the building to be erected upon the said lot of ground at and above the height of ten feet from the level of the present street pavement." Held, that it did not expressly and affirmatively appear that a restriction was placed upon the grantee's right to maintain windows below the height of ten feet, and that such restriction could not with certainty be implied; consequently a bill for injunction to restrain the maintenance below the height of ten feet in said wall was dismissed. *Gilmore v. Times Publishing Co.*, 18 Pa. Super. Ct. 363 (1901). "A restriction is not to be implied," said the court, "from the mere fact that the parties out of abundant caution unnecessarily mention a right which the grantee would have had if the clause had not been inserted."

This does not mean that the terms of restrictions must in all events be fully and minutely expressed. Restrictions will be construed to mean what the parties clearly intended that they should, but the intention must be clear. If not clear, the court will hold against the existence of the restriction. It has been declared that the doctrine of implied covenants and grants rests upon the presumed intention of the parties, and no right or duty can be created by implication when it is

necessary to disregard known facts to make the implication upon which the right or duty rests. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190 (1890).

An implied restriction on the reasonable use of leased premises by a tenant will not be found or enforced, unless a fair construction of the lease demands it. *Chamberlain v. Brown*, 141 Ia. 540, 120 N. W. 334 (1909).

"Restrictions under a general plan adopted by the owner for the purpose of selling lots may in equity be imposed upon lands of the owner, extending beyond the express restrictions contained in the deeds to a purchaser, and on the doctrine of implied covenants." Thus, where a husband and wife, owners of a tract of land by the entirety, improved it according to a general plan, and restricted the use of the lots therein for first class one-family residences, the wife, after the husband's death, was required to observe restrictions shown by the general plan to have been imposed upon certain lots adjoining one sold to complainant with reference to such general plan, although all of such restrictions were not contained in complainant's deed. *Schickhaus v. Sanford*, ... N. J. Eq. ..., 91 Atl. 878 (1914).

Again, it is held, that the purpose of the grantor in imposing restrictions on the use of land granted by him need not be stated in the deed; it being sufficient if such a purpose can be reasonably inferred.

The owner of land had built on a part of it with windows in his building overlooking the vacant portion. Subsequently he conveyed the latter portion, and in the deed the grantee covenanted not to build upon a strip of the land next to grantor's house. Held, that the covenant was binding on the grantee and all claiming under him with notice. *Phenix Insurance Co. v. Continental Insurance Co.*, 14 Abb. Pr. (N. S.) (N. Y.) 266 (1873).

The court said: "This covenant has been criticised with earnestness and subtlety, but I think it sufficient in form and substance. Though it does not mention the windows or their use, the motive for the restriction is apparent. Some benefit must have been contemplated. What benefit but light and air? It is not to be supposed that the owner, who was so prov-

ident as to exact this covenant in respect to the strip of land opposite to the six windows giving light and air to the interior of his building, had not in view that necessity, or that the grantee, seeing how that building was constructed, was not sensible to that benefit. In several familiar cases, courts in giving effect to restrictions of this nature, where the purposes were implied, perceiving what must have been in the minds of the parties, have inferred the purposes and benefits with reference to natural laws and necessities. Something is due to the fact that those windows were in use to the knowledge of the grantee when this covenant was made; also to the fact that, in obedience to this covenant, the grantee in erecting his building left this strip of land unoccupied. If need be, we thus get 'a clue to the intention of the parties.' "

Defendants owned a tract of land and offered the same for sale in lots, one of the conditions of sale being that the purchasers of lots three to seven inclusive should erect within two years from the day of sale, on each of the lots respectively purchased by them, a shop and dwelling house of a certain minimum value, and should enter into covenants to that effect with the vendor. Plaintiff purchased lot two, which adjoined lot three, but the lots three to seven were unsold, although efforts were made to effect a sale of them. Thereafter the defendants took steps to erect on such lots a fire engine station of a value exceeding the aggregate of the buildings contemplated by the conditions of sale. Held, in an action by plaintiff seeking to restrain the defendants from erecting the engine house, that the conditions being silent as to the user of the buildings, when erected, or their maintenance as shops and dwelling houses, a negative stipulation that such buildings and no other were to be erected ought not to be implied. *Holford v. Acton Urban District Council*, (1898) 2 Ch. 240, 78 L. T. Rep. 829, 67 L. J. Ch. 636, 14 T. L. Rep. 476.

§ 26. Duration of restrictions.

The duration of a restriction is a question of the intention of the parties, to be determined by construing the words used in the light of attending circumstances. *American Unitarian Assn. v. Minot*, 185 Mass. 589, 71 N. E. 551 (1904).

But where the time during which a restrictive covenant is to endure has not been expressly limited by the parties, it should be implied that some limitation was intended and that it was such as the nature of the case would indicate as reasonable. *Union Stock Yards Co. v. Nashville Packing Co.*, 140 Fed. 701, 72 C. C. A. 195 (1905).

Where a restriction provided that not more than two dwellings should be erected on the land conveyed within ten years thereafter, and such dwellings should be erected at least fifteen feet from the street and should aggregate in cost not less than three thousand dollars, such restriction had reference only to buildings to be erected within ten years after the date of the deed, and the restrictions ceased to be effective at the end of the ten years. *Mitchell v. Packham*, 103 Md. 693, 63 Atl. 219 (1906).

It has been held that a simple agreement between owners of adjacent estates for the erection of buildings thereon in a uniform manner, and a certain distance from the street, does not by implication require that the buildings shall thereafter remain in the same condition or of the same size or shape as when erected. *Hubbell v. Warren*, 90 Mass. (8 Allen) 173 (1864).

The owner of a tract of land conveyed parcels thereof with a covenant which provided that the grantees should not at any time thereafter without the written consent of the grantor and his successors use or occupy the land for any purpose except as a residence or summer resort. Held, that the grantees' property was restricted so long as the grantor or his successors saw fit to hold it in force. *Island Heights Assn. v. Island Heights Water Power, G. & S. Co.*, ... N. J. Eq. ..., 62 Atl. 773 (1906).

A contract for the sale of land provided that the vendee should erect on the premises a dwelling house of a specified character and description, to be located a certain distance from the street line, on which street the vendor owned other property. The contract also provided that the deed to be executed on performance of the vendee's covenant was to be subject to such restriction. The vendee moved onto the premises a house of the required description and thereby complied with

the covenant in question. Under the circumstances it was held that the vendor was entitled to have like restrictions inserted in the deed of the premises, and to insist upon a performance so long as they are of any benefit to him or his grantees. *Abraham v. Stewart*, 83 Mich. 7, 46 N. W. 1030, 21 Am. St. Rep. 585 (1890).

In this case the court said: "A deed with such restrictions in it as are contained in the contract in the case at bar would not give to the grantee the right to build a house in accordance therewith, and immediately thereafter remove it to the front line of the lot, or tear it down or remove it from the lot, and erect another building on the front line. Complainant by his deed can obtain no different rights than those provided for in the contract. . . . The conditions may be of actual and substantial benefit to the defendant. It is clear that the deed was to be made subject to them. They are such as she had a right to make as a condition to the grant. It is admitted that the defendant owned other lands upon the street. The intention of such benefits is therefore apparent."

§ 27. — when the restriction relates to the first building to be erected.

Contiguous city lots were sold subject to restrictive covenants that "the first building or buildings erected on said lots, or on either, any, or all of them, or on any part of either or all of said lots, shall be not less than two stories in height, and the front line of such building or buildings shall be set back at least twelve feet from the line of the street fronting the same." It was held that a covenantor would be enjoined from erecting a building on a part of his lot of the character prohibited, and extending into the restricted area thereof, although there be on such lot at the time a building which complies with the covenant. *Bauer v. Gribbel*, 2 N. Y. App. Div. 80, 37 N. Y. Supp. 609 (1896).

"The meaning and intent of the covenant is plain," said the court. "It forbids the erection of any building on the lots, or any part of them, in the first instance, unless such building is at least two stories in height, and is set back twelve feet from the street line. One evident purpose of the cove-

nant was to establish a building line, and the restriction in this respect applied to every foot of the land conveyed. The appellants argue that this construction would prevent the erection of outbuildings on the rear of the lots. Such a building would clearly be within the letter of the covenant, but it would not necessarily follow that a court of equity would specifically enforce the covenant against such a structure. Whether it would or not would depend upon the circumstances of each case. The covenant must have a reasonable construction and one which will carry out the evident intent of the parties. I do not think that it would prevent the construction of a one-story extension in the rear of a dwelling house that in other respects complied with its terms, and possibly it would not prevent the construction of a one-story wing on the side of a two-story house. But the building in process of construction is beyond the building line, and infringes upon the twelve-foot space, and in this respect it is a substantial and material violation of the covenant."

A deed to a number of city lots was accompanied by a plan showing the line to which the front walls of houses to be erected thereon should conform. Held, that the restriction applied only to the first building erected on each lot. *American Unitarian Assn. v. Minot*, 185 Mass. 589, 71 N. E. 551 (1904).

A restriction providing that there shall be "no building erected on the property conveyed costing less than fifteen hundred dollars," has been held to apply not only to the first building erected on the land, but to any building erected thereafter. Hence, the erection of a building costing six thousand dollars would not justify the owner in erecting thereafter a building costing less than fifteen hundred dollars. *Isham v. Matchett*, 18 Ohio Cir. Ct. Rep. 338, 10 O. C. D. 267 (1899).

§ 28. — building restriction imposed with reference to some other building.

Where the words of a restriction are used in relation to a certain house, and there is no reference to the use that may or may not be made of the property further than were speci-

fied in relation to such house, such restriction will be taken to expire with the life of the house in question. *Boston Baptist Social Union v. Boston University*, 183 Mass. 202, 66 N. E. 714 (1903). In such a case it must be assumed that if it had been the intention of the grantor to put restrictions upon the land for all time, that he would have done so by express words.

Where an owner conveyed a corner lot and specified in the deed that the building to be erected thereon should conform in appearance with his own building on an adjoining lot, such restriction applied only to the first erected on the corner lot, and its duration could not be extended beyond the life of the house so to be erected by the mere fact that the building on the grantor's adjoining lot continued to exist beyond that time. *Welch v. Austin*, 187 Mass. 256, 72 N. E. 972, 68 L. R. A. 189 (1905).

The court said: "The parties to the deed in question could have provided that the restrictions should apply to any building erected on the land conveyed so long as the dwelling house then erected on the grantor's land should stand unchanged. But they did not do so. What they did provide was that 'the dwelling house to be built on the granted premises' should be built in the way provided, so as to correspond with the grantor's 'adjoining house.' This might terminate the duration of the restriction, but cannot prolong it. For example, if Brewster had torn down the dwelling house then standing on his lot before a dwelling house was built on the granted premises, the restriction might, perhaps, have been thereby brought to an end. But by the terms of the provision adopted by the parties the duration of the restriction was measured by the life of the 'dwelling house to be built on the granted premises.' We are of opinion the restriction created by this deed expires when the dwelling house now on the petitioner's lot is torn down."

The owner of two lots, one being a corner lot and he having a residence on the second lot, conveyed the corner lot by deed containing the following restrictions: "The dwelling house to be built on the granted premises shall be set back five feet

from the line of Arlington street, and shall not exceed sixty-five feet in depth from said street so as to correspond in this particular with my adjoining house. The front elevation and the material used in the construction of the front on Arlington street shall correspond with my house adjoining according to the plan of G. J. F. Bryant herewith to be recorded, including a projection for about one foot on the front line as indicated on said plans. Two or three windows may be inserted in the front elevation from the second floor up, and one or two in the basement floor, as may be preferred by the grantee or his representative. The front on Marlborough street shall be of free stone, and shall correspond as nearly as may be with the front on Arlington street." Held, that the restrictions were not personal, but applied in favor of the successors in title so long as the house first built on the granted premises remained. *Welch v. Austin*, 187 Mass. 256, 72 N. E. 972, 68 L. R. A. 189 (1905).

The court said: "In the case at bar the things provided for are stated to be 'restrictions and agreements,' subject to which the land was conveyed. From the nature of the provisions, namely, a set-back from the street in front, a limit to the depth of the house on the back, and a specified facade, which was to make the house to be built on the lot conveyed one building with the house already built on the land of the grantor and the two houses next south of it, they are in their nature matters which would benefit the adjoining land of the grantor; and, as if to put beyond a doubt the question of this restriction having been imposed for the benefit of the only lot remaining owned by the grantor, it is stated in the deed that the restrictions are imposed so that the house to be built on the land conveyed shall correspond with the adjoining house of the grantor. We are of opinion that these provisions must be taken to have been inserted for the benefit of the adjoining land of the grantor, and constituted agreements which will be enforced as equitable restrictions."

§ 29. — restrictions created by mortgage.

Where an independent covenant is inserted in a mortgage, it does not necessarily expire with the payment and discharge

of the mortgage, but it is a matter of construction whether it was intended to survive the mortgage or not.

A mortgagor covenanted with the grantee and her heirs and assigns that no building or part of a building should be erected upon the granted premises for five years from the date of the mortgage, and that no building or part of a building erected thereafter on the granted premises should be more than two stories in height, and that the covenants should be binding upon and available to heirs and assigns, and run with the land for the benefit of the adjoining land of the grantee; and in the condition it was further provided that, upon payment and other performance by the grantor, the deed, with the exception of the covenants above recited, should be void. The court declared that this clearly showed an intention that the operation of the covenants should not cease with the discharge of the mortgage. The covenant that the land should not be used for buildings of more than a certain height was in effect the grant of an easement in favor of the adjoining premises, the violation of which by the defendant was properly restrained. *Brown v. O'Brien*, 168 Mass. 484, 47 N. E. 195 (1897).

A brewing company advanced money to enable the borrower to build a saloon, and took back a mortgage which provided that the mortgagor should not, for a period of twelve years, sell upon the mortgaged premises any beer, ale, or porter, except that manufactured by the mortgagee. It was held that the repayment of the sum borrowed with interest prior to the expiration of the twelve years did not terminate the restrictive agreement relative to the purchase of the beer. "Repayment of the money advanced," said the court, "would end the agreement to pay interest, but not the other two agreements, to buy plaintiff's beer and sell no other beer for the period limited, and so the matter stood between the parties, when defendant asked to have his mortgage cancelled. He was not entitled to a release of the mortgage, though he had repaid the loan. It still stood as security for these two additional promises." *Cleveland & Sandusky Brewing Co. v. Demko*, 29 Ohio Cir. Ct. R. 102 (1907).

§ 30. — effect of mortgage and foreclosure of restricted premises.

Where restrictions have been imposed on the use of premises the subsequent mortgaging of the premises is subject to such restrictions, and the foreclosure of such mortgage does not in any way affect them. In short, the mortgagor could not mortgage any greater interest than he owned, and his ownership being restricted, the interest he mortgaged was necessarily correspondingly restricted. Consequently the rights of third persons to have such restrictions enforced in their favor are not affected.

The owner of a block of ground divided it into lots, and conveyed the lots to different purchasers. In each of the deeds the grantee covenanted for himself, his heirs, executors, administrators, and assigns, with the grantor, his heirs, executors, administrators, and assigns, "that he shall and will not permit upon the said above granted or described premises or any part thereof, any slaughter house, or any other noxious, unwholesome, offensive or dangerous establishment, calling, trade or business." Subsequently two of the lots were conveyed back to the grantor by warranty deeds not containing the restriction. He then conveyed the two lots to one Brown, by deed containing by reference the same restriction as the first deed of conveyance. Thereafter Brown conveyed them to one Selmes with the same restrictive clause, and took back a mortgage which contained no mention of the restriction. Subsequently the mortgage was foreclosed. Held, that the deeds containing the restriction were a part of the record title of the property, and that the restrictive covenant could not be changed or materially affected by the mortgage in question and its foreclosure. *Raynor v. Lyon*, 46 Hun (N. Y.) 227 (1887).

§ 31. Alteration of restrictions.

Of necessity, one person is without the least power or capacity, in the absence of the delegation of authority, to release or change the rights of another in land. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190 (1890).

So where the owner of a tract of land plats the same and

offers the lots for sale under a general scheme for the improvement and benefit of the entire tract, and sells some of the lots subject to such restrictions, he cannot thereafter depart from the restrictions, and has no right to convey some of the unsold lots without restriction, or subject to different restrictions than those contained in the general plan. *Rowell v. Satchell* (1903), 2 Ch. 212, 89 L. T. Rep. 267, 73 L. J. Ch. 20; *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911); *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 379 (1909); *Gutting v. Eiermann*, 149 N. Y. Supp. 635 (1914).

"When a common grantor has parted with his title to a portion of the land for the benefit of which a restrictive covenant has been imposed on other land theretofore conveyed by the common grantor, it is not thereafter possible for the common grantor to release or modify the covenant, so far as it operated to confer a benefit on the land which he had previously conveyed." *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675 (1909).

Where the owner of land sells a portion thereof and exacts of the grantee a covenant relating to buildings to be erected thereon, and such covenant is one running with the land, the vendor, after selling parts of his remaining land, cannot release the covenantor from his covenant. *Western v. Macdermot*, L. R. 1 Eq. 499 (1866), affirmed in L. R. 2 Ch. 72, 15 L. T. Rep. 641, 36 L. J. Ch. 76, 12 Jur. (N. S.) 366, 15 Wkly. Rep. 265 (1867).

The owner of a tract of land subdivided a portion of it and caused a map to be made thereof on which it was stated that "this property when sold is restricted, thus making it a first class residence locality." He then sold the lots, restricting their use to residential purposes, fixing a minimum cost of buildings to be erected thereon, and requiring that the buildings be set back twenty feet from the building line. The deeds referred to the map and provided that the restrictive covenants should be applicable to all the property shown thereon, and should be operative until 1920 and run with the land. It was held that a grantee of some of the lots could not give a marketable title thereto by accompanying his deed with

a release by the original owner and his wife of the restrictive covenant; that such restrictions inured to the benefit of all of the grantees of the lots in such subdivision and could not be released without their consent. *McDougall v. Schneider*, 134 N. Y. App. Div. 208, 118 N. Y. Supp. 861 (1909).

Where a company, owner of a tract of land, improved the same according to a general plan and imposed building restrictions on the lots conveyed in accordance therewith, it could not thereafter by resolution affect such restrictions. *Waters v. Collins*, ... N. J. Eq. ..., 70 Atl. 984 (1895). "The company could not sell lots," said the court, "holding out to the grantees a restrictive scheme intended to advance the value of the property sold, at the expense of the property to be yet sold, and afterwards receive an enhanced price for subsequent lots, by a removal in full or in part of the restrictions bargained for."

Although a purchaser did not actually know of the existence of a building restriction on land purchased by him, where he purchased all the rights of his vendor relating to his plot of land, it was impossible for the vendor, from the time of the purchase, to release the purchaser from his covenant, or to alter in any respects his rights against him. *Child v. Douglas*, 1 Kay 575, 2 Jur. (N. S.) 950, 5 De G. M. & G. 739, 2 Wkly. Rep. 461, 701 (1854).

Where a town site is laid out by the owner of a tract of land and the streets and blocks indicated on a plat, with reference to which plat the lots are sold, and on the plat certain parcels are designated as public grounds, and the purchasers of the lots buy with the understanding that the lands are to be used as designated on the plat, the purchasers of lots adjacent to such public grounds have a right to enjoin the diversion of such grounds by the proprietor to other purposes, and such right cannot be affected by a subsequent change of the plat by the proprietor without their consent. *Fisher v. Beard*, 32 Ia. 346 (1871).

If the owner of a tract of land, which he has subdivided and placed on the market for sale in parcels under a general plan, reserves the right in such plan and in all the deeds of

conveyance to alter the plan and the restrictions imposed on the parcels, he has, of course, a right to do so, in accordance with such provision. *Whitehouse v. Hugh* (1906), 2 Ch. 283.

A deed containing a provision that the covenants and restrictions imposed by the grantor might be varied by him as occasion might require, was held to permit variations as to the details to suit varying circumstances or changed conditions, but could not be construed so as to annul the covenants or restrictions by permitting subsequent purchasers to erect any kind of buildings on the premises. *Hisey v. Eastminster Presbyterian Church*, 130 Mo. App. 566, 109 S. W. 60 (1908).

§ 32. — by majority of owners of restricted property.

The owner of one of a number of lots sold under a general plan of improvement is not bound by an agreement entered into by all the other lot owners modifying a building line restriction imposed on their lots as a part of the general plan of improvement, to which agreement he never assented. This is true although the building line restriction on his lot is different from that imposed on all the other lots, and that of the other lots being uniform.

All of the lots in a tract of land, excepting a corner lot, were conveyed subject to a restrictive covenant that no building should be erected within twenty feet of the street line, and in regard to the corner lot it was provided that no building should be erected within ten feet of the street line. The lots were sold under a general plan of improvement, and were subject to the incidents of lots sold under such conditions. The grantees of the lots subject to the twenty-foot building line entered into an agreement modifying the covenant so as to limit the restriction to ten feet, but the owner of the corner lot was not a party to the agreement and was in no way bound thereby. In an action by the owner of one of the lots subject to the twenty-foot line to enjoin the owner of the corner lot from erecting a building nearer than ten feet to the street line, it appeared that the complainant had erected a building on her lot at a distance of only ten feet from the street. It was held that the complainant was not entitled to restrain the defendant from erecting a building in violation

of the restriction in question, because the building on her land was in violation of the restriction limiting buildings erected thereon to a twenty-foot line, and that as the defendant had not agreed to a modification thereof, and his property being restricted as a part of the general plan, he was not bound by the agreement modifying the same. The fact that the building line imposed on his lot was different from that imposed on all the other lots did not affect his rights as a grantee under the general plan. While he had no right to violate the restriction imposed on his lot, none of the other owners who had built nearer than twenty feet to the street had a right to maintain a suit to enjoin him from violating the restriction. All of the other owners could build in accordance with the terms of their agreement with each other, and enforce the observance of such agreement as between each other, but this had no application to one who was not a party to the agreement. *Coates v. Cullingford*, 147 N. Y. App. Div. 39, 131 N. Y. Supp. 700 (1911).

§ 33. Termination or extinguishment of restrictions.

Restrictions contained in a deed of conveyance to land cannot be extinguished by parol agreement between the owners of the servient and dominant estates. Restrictions thus created can only be extinguished by deed or note in writing, or operation of law. *Fogal v. Swart*, 37 Pa. Super. Ct. 217 (1908).

The general rule is that where the title to the dominant and servient estates meet in the same individual there is a merger of the titles which extinguishes the restriction. *Korn v. Campbell*, 119 N. Y. App. Div. 401, 104 N. Y. Supp. 462 (1907), reversing 52 N. Y. Misc. 220, 102 N. Y. Supp. 108 (1906).

The owner of land conveyed a twenty-five foot lot thereof with a restriction against building nearer than sixteen feet to the street. Subsequently he conveyed an adjoining lot to the same grantee without such restriction. Thereafter the executors of the owner conveyed the remaining land without restriction. The owner did not impose any restriction on lots owned by him on the other side of the street, and there was

no general plan of improvement in the vicinity requiring the buildings to be erected any certain distance from the street. Subsequently a purchaser of the second lot and seven feet of the first lot refused title because of the restriction on the first lot. Held, that when the lots were purchased by the same person any restriction on the use of one lot in favor of the other lot was extinguished, as the restriction imposed was merely personal to the original owner. *Schwoerer v. Leo*, 39 N. Y. Misc. 505, 80 N. Y. Supp. 399 (1902), affirmed in 83 N. Y. App. Div. 643, 82 N. Y. Supp. 1114.

The owner of a tract of residential property conveyed two lots thereof to his son, and subsequently platted the entire tract, including his son's lots. On his death all of his heirs conveyed the tract to a stranger, who immediately reconveyed to the son his lots, and the balance of the property to the other heirs. According to the plat made by the father the lot lines were not at right angles with the street, and the heirs replatted the tract and caused a new plat to be filed, by which the lot lines were straightened. Held, that the purpose of the conveyances appeared from the deeds themselves, and was for the purpose of straightening the lines of the lots, and that they did not have the effect of merging and terminating the restrictions in the father's deed to his son. *Appel v. Buckbinder*, 82 N. Y. Misc. 312, 143 N. Y. Supp. 710 (1913).

It was held, however, that parol evidence was not admissible to show that such conveyance was for the purpose of straightening lot lines, and not to destroy the restriction. *Appel v. Buckbinder*, 82 N. Y. Misc. 312, 143 N. Y. Supp. 710 (1913).

The owner of a tract of land conveyed the same and inserted in the deed a restriction against nuisances and against the use of the property for other than private residences. A subsequent grantee acquired the land under warranty deed subject to such restrictions, and erected houses on the tract and conveyed to different parties without restriction. The original grantor owned no land in the vicinity of this tract. Held, that when the subsequent grantee divided the tract into separate portions and conveyed to different grantees without restrictions, such grantees could not enforce the former restriction against each other. *Korn v. Campbell*, 119

N. Y. App. Div. 401, 104 N. Y. Supp. 462 (1907), reversing 52 N. Y. Misc. 220, 102 N. Y. Supp. 108 (1906).

One Sanger owned lots numbers 180 and 182. He conveyed number 180 to one Muller, and in the deed the parties covenanted not to erect a stable on either of the lots. Muller's lot was subsequently conveyed subject to such restriction. Sanger then conveyed his lot by a full covenant deed, the purchaser having constructive notice of the restriction placed upon the two lots. Held, that in so conveying his lot Sanger violated the terms of the restriction and his purchaser taking with notice of the restriction and the circumstances under which he accepted the grant, gained no easement in the other lot and could not enforce observance of such restriction. *Magee v. Palmer*, 150 N. Y. App. Div. 356, 134 N. Y. Supp. 1040 (1912).

S. was the owner of a lot on which he erected a cotton mill. He conveyed to R. an adjoining lot with the right to use, for a paper mill, water conveyed in a race across the lot of S. R. in turn covenanted that the water should be used for no other purpose. S. mortgaged his lot, and subsequently both properties became vested in V., subject to the encumbrance, who changed the paper mill into a cotton factory. On foreclosure of the mortgage of S., the lots vested in different persons. Held, that there was no merger of the condition as to the use of the water, and that the owner of the R. lot could be restrained from using the water, conveyed across the S. lot, for purposes other than a paper mill. *Wells v. Chapman*, 4 Sandf. Ch. (N. Y.) 312 (1846).

The fact that some of the later deeds in the chain of title to property do not expressly refer to restrictions on the use thereof as contained in the original plat, recognized by all lot owners, including the grantee, as a common source of title, does not, of itself, relieve such lots from the binding force of such restrictions. *Ewertsen v. Gerstenberg*, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310 (1900).

CHAPTER II.

CONSTRUCTION OF RESTRICTIONS.

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§ 34. Generally.

The primary rule for the interpretation of restrictive covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met. *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. 275, 21 Am. St. Rep. 652 (1891); *Empire Bridge Co. v. Larkin Soap Co.*, 59 N. Y. Misc. 46, 109 N. Y. Supp. 1062 (1908); *Jamison v. McCredy*, 5 Watts & S. (Pa.) 129 (1843).

The purpose of a grantor, with whom a restrictive covenant

is made, may be evidenced by language of the covenant itself, or by other language in the same deed. *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 Atl. 14 (1901), affirmed in 63 N. J. Eq. 804, 52 Atl. 1132 (1902).

"A covenant is not fulfilled, when its intent and spirit are broken, though complied with in the letter." *Voorhies v. Anthon*, 12 N. Y. Super. Ct. (5 Duer) 178 (1855).

Courts are not confined to their strict and literal meaning, but the words are to be taken in the sense which the parties intended. "The law will rather do violence to the words, than break through the intent of the parties." *Wright v. Evans*, 2 Abb. Pr. (N. S.) (N. Y.) 308 (1867).

On this theory a fence has been held to be a "building" within the meaning of a covenant the purpose of which was to prevent the obstruction of light and air, and the fence, which was to have been twenty feet high, would constitute such an obstruction. *Wright v. Evans*, 2 Ab. Pr. (N. S.) (N. Y.) 308 (1867).

A restriction reciting that buildings erected should have no L. more than two stories in height, was held to have no application to a building without an L. In construing this provision the court said: "Restrictions of the character of those which we are considering are to be interpreted fairly and reasonably, and according to the apparent purpose of protection or advantage to the several estates which they are intended to secure or promote. While they are not to be narrowly construed, they are not to be unduly enlarged. The original grantor saw fit to insert in the deeds which he gave a restriction that only dwelling houses should be built on these lots. The court have found that the building which the defendant proposes to erect will be a dwelling house. It is possible that, if the original grantor had anticipated the erection of a building like that which the defendant is about to put up, it would have inserted in its deeds some restriction to meet it. It is also possible that it did anticipate it, and that the restrictions which the deed contains embody all that the original grantor thought it wise to insert. Taking the deed as it stands, we do not see anything in it which should lead us to the conclusion that the defendant will violate any

restriction, express or implied, in regard to the building of an L., in the proposed manner of constructing his building." *Smith v. Bradley*, 154 Mass. 227, 28 N. E. 14 (1891).

§ 35. Should be construed strictly.

Restrictions on the use of real property will not be enlarged or extended by construction, and any doubt will be construed in favor of the grantee. *Firth v. Marovich*, 160 Cal. 257, 116 Pac. 729 (1911); *Easterbrook v. Hebrew Ladies' Orphan Society*, 85 Conn. 289, 82 Atl. 561 (1912); *Hartman v. Wells*, 257 Ill. 167, 100 N. E. 500 (1913); *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040 (1902); *Downen v. Raybvrn*, 214 Ill. 342, 73 N. E. 364 (1905); *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076 (1896); *Noel v. Hül*, 158 Mo. App. 426, 138 S. W. 364 (1911); *Kitchen v. Hawley*, 150 Mo. App. 497, 131 S. W. 142 (1910); *Ronan v. Barr*, ... N. J. Eq. ..., 89 Atl. 282 (1913); *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492 (1912), affirmed in 81 N. J. Eq. 210, 86 Atl. 398 (1913); *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611 (1912); *Walker v. Renner*, 60 N. J. Eq. 493, 46 Atl. 626 (1900); *Gubbins v. Peterson*, 21 N. Y. App. Div. 241, 47 N. Y. Supp. 685 (1897), affirmed in 163 N. Y. 583, 57 N. E. 1111 (1900); *White v. Collins Building & Const. Co.*, 82 N. Y. App. Div. 1, 81 N. Y. Supp. 434 (1903); *Hurley v. Brown*, 44 N. Y. App. Div. 480, 60 N. Y. Supp. 846 (1899); *St. Andrew's Church's Appeal*, 67 Pa. St. 512 (1871); *Jones v. Williams*, 56 Wash. 588, 106 Pac. 166 (1910); *Richardson v. Clements*, 89 Pa. St. 503 (1879); *Ogontz Land & Imp. Co. v. Johnson*, 3 Pa. Dist. 642 (1893). All doubts are to be resolved in favor of natural rights and against restrictions. *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391 (1893); *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. 687 (1889); *O'Gallagher v. Lockhart*, ... Ill. ..., 105 N. E. 295 (1914); *James v. Irvine*, 141 Mich. 376, 104 N. W. 631, 12 Det. Leg. N. 454 (1905); *McCloskey v. Kirk*, ... Pa. St. ..., 90 Atl. 73 (1914).

Where the language of a restrictive covenant, when read in the light which the context and the surrounding circumstances throw upon it, remains of doubtful meaning, it will be construed against, rather than in favor of, the covenant.

Easterbrook v. Hebrew Ladies' Orphans' Society, 85 Conn. 289, 82 Atl. 561 (1912).

In other words if the language of the restriction is susceptible of more than one construction, that one must be adopted which militates most strongly against the interests of the grantor or covenantee. *Bevan v. Muir*, 53 Wash. 54, 101 Pac. 485 (1909).

"As the restriction was created by the grantor, the words which he used are not to be extended in their meaning, but are to be interpreted most strongly against him." *Boston Baptist Social Union v. Boston University*, 183 Mass. 202, 66 N. E. 714 (1903).

In case of doubt, a restriction is to be construed in favor of the grantee's right not to have his land restricted. *American Unitarian Assn. v. Minot*, 185 Mass. 589, 71 N. E. 551 (1904).

Restrictive covenants are to be construed most strictly against the covenant, and unless the use complained of is most plainly within the provisions of the covenant it will not be restrained. *Clark v. Jammes*, 87 Hun 215, 33 N. Y. Supp. 1020 (1895).

A restriction prohibiting the erection of a dwelling on a certain portion of a lot, although a lawful restriction, is not favored by the law, "being an interference with the owners' free and full use of their property. Nevertheless, if the intent of the grantor who first imposed it as a condition of the conveyance to the grantee clearly appears, and it is still of value to the adjoining and dominant lot it will be enforced; but all doubt must be resolved against it in favor of free and unrestricted use of property. Nothing will be regarded as a violation of it that is not in plain disregard of its express words. There are no implied rights arising from it which courts will recognize, and covenants are not to be extended by implication." *Crofton v. St. Clement's Church*, 208 Pa. 209, 57 Atl. 570 (1904).

But this rule applies only when the language is doubtful, and does not obtain where the language is sufficiently clear to define the character and extent of the exception or reservation. *Richardson v. Clements*, 89 Pa. St. 503 (1879).

The rule has been laid down that in construing a covenant by indenture, the words of the covenant are to be taken, however set down in the instrument, as the words of the party to whom they properly belong, or if properly belonging to both, as the words of both. The words of an indenture being the words of either party, are not to be taken more strongly against the one or beneficially for the other. *Beckwith v. Howard*, 6 R. I. 1 (1859).

While it is true that a restrictive covenant as to the use of land should be construed strictly, this is so in the same sense in which a covenant of suretyship should be strictly construed. In determining what the intent of the parties to the contract was when the same was entered into, it should be construed as any other contract. When the intent of the parties has been determined, then the rights of the parties as so fixed and determined should be neither extended, on the one hand, nor limited, on the other, but strictly enforced. *Silberman v. Mayer*, 48 N. Y. Misc. 468, 96 N. Y. Supp. 928 (1905), affirmed in 116 N. Y. App. Div. 869, 102 N. Y. Supp. 299 (1907).

§ 36. — when restriction is burdensome to grantor.

When the existence of an encumbrance on land in the nature of a restriction on its use will result seriously to the owner and with but slight benefit to the owner of what is claimed to be the dominant estate, it is only by the use of plain and direct language that the grantor should be held to have created such a right in favor of the other premises and made his own servient thereto for all time to come. This, because it is not likely that the parties intended or contemplated any such result. *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. 275, 21 Am. St. Rep. 652 (1891).

§ 37. In favor of free use of property.

In this country real estate is an article of commerce, the uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed; hence it is contrary to the well recognized business policy of the country to tie up real estate where the fee is conveyed, with restrictions and prohibitions as to

its use; and hence, in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee, all doubts should, as a general rule, be resolved in favor of a free use of property and against restrictions. *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391 (1893); *Van Duyn v. Chase & Co.*, 149 Ia. 222, 128 N. W. 300 (1910); *Ewertsen v. Gerstenberg*, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310 (1900). And when an attempt is made to enjoin a property owner from making use of his premises and building thereon in the usual and ordinary way, the court must be convinced that he or his predecessor in title has taken the premises by a deed which contains a restriction or condition expressed in clear and certain terms, or which contains a promise, agreement, or undertaking on the part of the grantee clearly expressed, or which contains such terms as have a certain legal operation from which a covenant would necessarily arise. *Gilmore v. Times Publishing Co.*, 18 Pa. Super. Ct. 363 (1901).

Nevertheless, proper building restrictions and other limitations on the use of property of a character which the law permits to be attached to land, in such a sense as to restrict the use of one parcel thereof in favor of another, will be enforced in a proper case in courts of equity upon equitable grounds in favor of or against the party designed to be benefited or burdened thereby. *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668 (1907).

§ 38. Intention of the parties must be given effect.

While the tendency of the courts is to discourage restrictions on the free alienation of property, it is also well settled that deeds and other instruments affecting title to land, like all contracts, are to be interpreted, as nearly as possible, according to the obvious intent of the parties contracting. *Bolin v. Tyrol Investment Co.*, ... Mo. App. ..., 160 S. W. 588 (1913); *Test Oil Co. v. La Tourette*, 19 Okl. 214, 91 Pac. 1025 (1907).

The true intent of the parties, if clearly ascertainable, must be given effect. *Hartman v. Wells*, 257 Ill. 167, 100 N. E. 500 (1913); *Kenwood Land Co. v. Hancock Investment Co.*,

169 Mo. App. 715, 155 S. W. 861 (1913); *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911); *Kitchen v. Hawley*, 150 Mo. App. 497, 131 S. W. 142 (1910).

Restrictions on the use of property held in fee are not favored, yet where the intent of the parties is clearly manifested in the creation of restrictions or limitations upon the use of the grantee, for the benefit of the grantor, his heirs or assigns, a court of equity will enforce the same. *Eckhart v. Irons*, 128 Ill. 568, 581, 20 N. E. 687 (1889).

When the intention of the parties is clearly expressed in restrictive covenants, they will be strictly enforced. *Kenwood Land Co. v. Hancock Investment Co.*, 169 Mo. App. 715, 155 S. W. 861 (1913); *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391 (1893).

The construction must be in accordance with the intent of the parties as expressed therein, coupled with the surrounding circumstances as nearly as the same can be ascertained. *Deeves v. Constable*, 87 N. Y. App. Div. 352, 84 N. Y. Supp. 592 (1903).

The intention of the parties to the instrument, when clearly ascertained, is of controlling efficacy, though conditions and limitations are not readily to be raised by mere argument. The question is one not depending so much upon artificial rules of construction as upon the application of good sense and sound equity to the object and spirit of the contract. *Druecker v. McLaughlin*, 235 Ill. 367, 85 N. E. 647 (1908).

In short, restrictions must be construed so as to make the intention of the parties effective. *Hyman v. Tash*, ... N. J. Eq. ..., 71 Atl. 742 (1908).

In interpreting a restrictive covenant "the thing to be ascertained is the intention of the parties, and the court, in endeavoring to ascertain such intention, will place itself as nearly as possible in the situation of the parties and in possession of their knowledge of the circumstances under which the contract was made, and for this purpose, will, when necessary, call to its aid evidence *de hors* the covenant." *Brockmeyer v. Sanitary District*, 118 Ill. App. 49 (1905).

In connection with the construction of a restrictive covenant imposed on land in accordance with a general plan of im-

provement, the Supreme Court of Michigan said: "While there is authority for saying that, in construing this language we should resolve doubts in favor of defendants, it is none the less our duty to give said language its obvious meaning. We are to construe the language in accordance with the intention of the parties to the deed. In construing it, we should not assume that the restriction was inserted solely for the benefit of the grantor. The purpose of the restriction is not merely to benefit the grantor, but every owner of property and every resident on the street. Such a restriction assures purchasers that property will be devoted in a specified manner to residence purposes, and has a tendency to increase its value. And we think it not improper to say that it may fairly be inferred in the case at bar that this restriction and its general observance has increased the value of defendant's property." *Harris v. Roraback*, 137 Mich. 292, 100 N. W. 391, 11 Det. Leg. N. 251, 109 Am. St. Rep. 681 (1904).

Where a deed of conveyance of a lot included within a general plan of improvement contained a covenant that the north wall of a dwelling to be located thereon should be "at least five feet from the northerly line of said premises," and made the conveyance subject to the covenants contained in a deed to the grantor, which contained a covenant that the dwelling should stand "five feet from the north line" of the premises, it was held that the most reasonable inference to draw from the facts was that the words "at least" in the latter conveyance crept in by inadvertence, and that the intention was to locate the wall exactly five feet from the north line of the lot. *Thompson v. Diller*, 146 N. Y. Supp. 438 (1914).

Where the intention of the parties was clearly expressed to prohibit the drilling of oil and gas wells upon a certain tract of land in all deeds for the conveyance of any and all portions thereof, such a covenant will not be enlarged by implication to include the insertion of the prohibition in a lease of said tract. *Test Oil Co. v. La Tourette*, 19 Okla. 214, 91 Pac. 1025 (1907).

Although an agreement imposing restrictions on the use of property may on its face and by its terms appear to be ob-

ligatory on one party only, yet if it was the manifest intention of the parties that there should be a correlative obligation on the other party, the law will imply such obligation. *Compton Hill Imp. Co. v. Tower*, 158 Mo. 282, 59 S. W. 239 (1900).

A corporation authorized by its charter to buy and sell lands subject to restrictions made a conveyance in which the grantee covenanted not to violate any of the provisions of the corporation's charter, "by-laws, rules or regulations made by the said" grantor "at any time." Held, that the words "at any time" had reference to the date of violation, and not to the date of the adoption of the by-laws, rules or regulations. *Newbery v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752 (1909).

Where a covenant in a deed related to the location of "dwellings" on the land conveyed, and the grantor did not contemplate the erection of business buildings on the street, the neighborhood being a residential one, the word "dwellings" was held to apply to business buildings and other structures erected on the land. *Hyman v. Tash*, ... N. J. Eq. ..., 71 Atl. 742 (1908).

§ 39. How intention ascertained.

The primary rule governing the interpretation of restrictive covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement, but the entire contract, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met. *Easterbrook v. Hebrew Ladies' Orphans' Society*, 85 Conn. 289, 82 Atl. 561 (1912). The controlling fact, when discovered, is the express intent. Intent unexpressed will be unavailing.

"The intention of the parties must be determined from the language of the covenant itself considered in connection with surrounding circumstances at the time the covenant was made; or, as it is sometimes said, from the language of the covenant itself, considered in the light of the entire context of the instrument containing it. Such covenants must be considered with reference to the situation of the property affected and

its present and prospective use as well as to the language employed in expressing the covenant." *Kenwood Land Co. v. Hancock Investment Co.*, 169 Mo. App. 715, 155 S. W. 861 (1913). See also, *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391 (1893); *Druecker v. McLaughlin*, 235 Ill. 367, 85 N. E. 647 (1908).

The intention of parties to a restrictive covenant is to be ascertained, not by learning some secret or unexpressed intention in their minds, but from the language of the covenant itself, considered in connection with the circumstances existing at the time it was executed. *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040 (1902).

In ascertaining the intention of the parties to an instrument containing a restrictive covenant, the whole instrument must be considered. *White v. Collins Building & Const. Co.*, 82 N. Y. App. Div. 1, 81 N. Y. Supp. 434 (1903).

The meaning to be attributed to a restrictive covenant is to be ascertained, not only by a consideration of its language, but also by a consideration of the circumstances existing at the time of the creation of the covenant and its obvious purpose. *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492 (1912), affirmed 81 N. J. Eq. 210, 86 Atl. 398 (1913).

The court should also bear in mind the purpose to be achieved by the covenant. *Godfrey v. Hampton*, 148 Mo. App. 157, 127 S. W. 626 (1910).

Parol evidence is sometimes competent to enable the court to place itself in the position of the parties at the time of the making of a restrictive covenant for the purpose of ascertaining their true intention. *Brockmeyer v. Sanitary District*, 118 Ill. App. 49 (1905).

§ 40. — extraneous circumstances.

Where the terms of the restriction are doubtful, they are to be considered in the light thrown on them by proved or admitted facts. The situation in which the parties stand, the necessity for which they would naturally provide, the conveniences they would probably seek to secure, and the circumstances and relations of the property in regard to which they have negotiated, are to be considered in interpreting

them. *Meigs v. Lewis*, 164 Pa. St. 597, 30 Atl. 505, 35 Wkly. N. Cas. 317 (1894); *Electric City Land & Imp. Co. v. West Ridge Coal Co.*, 187 Pa. St. 500, 41 Atl. 458 (1898); *Deeves v. Constable*, 87 N. Y. App. Div. 352, 84 N. Y. Supp. 592 (1903).

At the time of the execution of a deed a narrow strip or alley mentioned therein was built over its entire length and constituted a covered private way from a front street to a back street. The building over the strip from the back street for a distance of eight feet was a mere platform, the top of which was twelve feet six inches above ground, and the building over the balance was a dwelling nineteen feet eight inches higher than the platform, or thirty-two feet above ground. The deed contained a reservation in the grantor of the right to build over and above the strip or alley "in like manner as the same is now done." It was held that, construing the reservation in the light of surrounding circumstances, it related merely to the point and manner of the location of the structure over the alley, and not to the height of the structures. *Meigs v. Lewis*, 164 Pa. St. 597, 30 Atl. 505, 35 Wkly. N. Cas. 317 (1894).

But where the terms of a restriction are clear and unambiguous, it is improper to inquire into the surroundings or extraneous circumstances for aid in its construction. *Highland Realty Co. v. Groves*, 130 Ky. 374, 113 S. W. 420 (1908).

§ 41. Particular enumeration followed by general descriptive words.

Where a particular enumeration is followed by general descriptive words, the latter will be understood as limited in their scope to matters and things of the same general kind and character as those specified in the particular enumeration unless there is something to show a contrary intent. When no such contrary intent appears the general words will be construed with reference to the context, and the specific terms with which the general are associated in the context will control the meaning to be given to the more general expression used in their immediate connection. *Easterbrook v. Hebrew Ladies' Orphans' Society*, 85 Conn. 289, 82 Atl. 561 (1912); *Cross v. Frost*, 64 Vt. 179, 23 Atl. 916 (1891).

Where specific enumeration of trades or businesses are mentioned in a restriction followed by words of general character, the latter are to be construed in the light of the previous specifications. *Atlantic Dock Co. v. Libby*, 45 N. Y. 499 (1871).

In 1834 the owners of a tract of land in a city entered into mutual covenants restricting the use thereof, providing for an open square to be reserved with driveways around it. A building line was established on the lots and it was provided in regard to some of the lots that no building "except a handsome two-story dwelling house with or without wings" should be erected thereon, and further provided that "neither they nor their heirs or assigns shall or will at any time hereafter erect or permit upon any part of any or either of the said twenty lots any livery stable, slaughter house, smith shop, forge, furnace, steam engine, brass foundry, nail, or other iron factory, or any manufactory of gun powder, glue, varnish, vitriol, ink or turpentine, or for dressing, tanning, or preparing skins, hides, or leather, or any brewery, distillery, public museum, theater, circus, place for the exhibition of animals, or any other trade or business, dangerous or offensive to the neighboring inhabitants." It was held that the maintenance of a home for orphans and aged persons who were supported chiefly by charity, but in part from payments by inmates, was not conducting a "business" within the meaning of such covenant, although the neighboring inhabitants might regard it offensive. *Easterbrook v. Hebrew Ladies' Orphans' Society*, 85 Conn. 289, 82 Atl. 561 (1912).

After commenting at considerable length on the proper construction of this clause, the court continued as follows: "Further reinforcement of this view is found in the characteristic features which mark the several forms of business specifically forbidden, and these features furnish significant indications of the basic reasons for their restrictive prohibitions. Each one of them is either inherently dangerous, notoriously offensive to the sense of smell, or naturally unpleasantly noisy in their operation, obnoxious to a prevailing moral sense, or attractive of crowds of people, more or less heterogenous in character. These features are peculiarly incident to enter-

Collins Building & Const. Co., 82 N. Y. App. Div. 1, 81 N. Y. Supp. 434 (1903).

Technical terms made use of are presumed to have been used in their accustomed meaning, unless the circumstances and context indicate a different intent. *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655 (1890).

Restrictive covenants fall within the rules of construction which are applied to contracts, statutes, and other instruments, with a view of avoiding results which are absurd, or inconsistent with what was meant by the parties to or the framers of the instrument. *Chase v. Walker*, 167 Mass. 293, 45 N. E. 916 (1897).

§ 43. Practical construction by the parties.

Where all persons concerned have considered that certain buildings erected were in accordance with restrictions imposed on the property, and continued to act accordingly for a long period of time, and where the deviation from the strict letter of the restrictions was slight, the buildings will be treated ordinarily as conforming to the restrictions.

In an action in Massachusetts to compel the removal of a portion of a building erected in violation of certain building restrictions, it was contended by the defendant that the plaintiffs could not prevail because they themselves were violating the same restriction which they sought to enforce against the defendant. It appeared that the original deed, through which the defendant gained title, contained a clause that "A dwelling house has been erected and completed on the lot in conformity with the conditions and restrictions." It appeared that the erections on the plaintiffs' lot were those originally placed there, and that they were substantially the same on the two lots. It was further found that the old buildings on both plaintiffs' and defendant's lots were only in slight and immaterial violation of the restrictions, but this was not the violation of which plaintiffs complained, but were the only violation which it was contended the plaintiffs were guilty of. It was held that this fact did not prevent the plaintiffs from maintaining their action. In respect of this question the court said: "It follows that they were regarded on all sides more

than fifty years ago as a substantial compliance with the restrictions. Whether these constitute in small particulars technical deviations from a strict compliance with the letter of the restrictions is of no consequence after the lapse of half a century of general concurrence in a practically uniform construction of their meaning by acts done." *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910).

Where it was doubtful whether the provisions of a lease required the tenant to furnish steam for an adjoining premises, the practical construction placed thereon by himself, and acted on for several months, would control the meaning of the lease when he thereafter attempted to place a contrary construction on it. *Smith v. Taranto*, 140 N. Y. Supp. 794 (1913).

Where a covenant not to erect any building other than "a dwelling house and its appropriate buildings" has been given a practical application and interpretation by all of the parties concerned for a long period of time, and which parties were allowed to erect two family houses of three stories, and other two family houses on a single lot, such covenant will not be enforced against a grantee who proposes to erect a three-story apartment house. *Underwood v. Herman & Co.*, ... N. J. Eq. ..., 89 Atl. 21 (1913).

Where a vendor seeks to enforce the observance of restrictions by a grantee, and the meaning of the restrictive clause is clear and without doubt, the conduct of other grantees in respect to the use of their property in the same neighborhood held under similar restrictions cannot be used to show a practical exposition or construction of the clause. There is no necessity for a practical exposition where the meaning of the clause is clear. A further reason for the exclusion of such conduct is, that evidence of practical interpretation must arise from transactions between the same parties, and not between one of the parties to the instrument and a stranger. *Evans v. Mary A. Riddle Co.*, ... N. J. Eq. ..., 43 Atl. 894 (1899).

§ 44. Restriction made with reference to statute.

Where at the time a restriction is created there is in exist-

ence a statute providing that no such agreement shall be effective for a longer period of time than thirty years, such restriction must be taken as if such statutory provision was incorporated therein. Such a provision, however, has nothing to do with the uses of the property against which it is restricted, but has reference to the period of its duration only. *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730 (1911).

Where a conveyance of land recites that the same is subject to the restrictive provisions of a statute, when in fact it is not located within territory referred to in the statute, no restriction is created on the land conveyed. *Title Guarantee & Trust Co. v. Fallon*, 101 N. Y. App. Div. 187, 91 N. Y. Supp. 497 (1905).

§ 45. Statutory definition of words.

A statute defining the words "tenement house" has no application to the construction of those words in a covenant of restriction in a deed against the erection of a tenement house on the land conveyed. *Kitching v. Brown*, 92 N. Y. App. Div. 160, 87 N. Y. Supp. 75 (1904), affirmed in 180 N. Y. 414, 73 N. E. 241, 70 L. R. A. 742 (1905); *White v. Collins Building & Const. Co.*, 82 N. Y. App. Div. 1, 81 N. Y. Supp. 434 (1903).

§ 46. Where there are several restrictions in same instrument.

A number of separate restrictions contained in the same deed, may or may not be interdependent, depending upon their nature and relation to one another, and the circumstances surrounding their making. Where each is independent of the others, it will be construed as if standing alone; but where they relate to each other, each one will be construed in view of its relation to the others.

A deed contained six restrictions, number two of which provided that buildings should be erected a certain distance from the street, and the fifth provided that "no building which shall be erected on the said lot shall be less than three stories in height, exclusive of the basement and attic, nor have an L.

of more than two stories in height: nor shall said building or said L. have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling house for the term of twenty years." Held, that the limitation as to time in the fifth clause did not apply to the second clause. *Emmels v. Werner*, 144 Mass. 396, 11 N. E. 684 (1887).

A deed conveying a lot of ground provided that "no buildings which may be erected on said lot shall be less than three stories in height, exclusive of the basement and such may have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling house for the term of twenty years from the first day of April, 1859." Held, that the limitation as to time applied only to the mode of use and occupation, and not to the height of the buildings or the materials of the outer walls. *Keening v. Ayling*, 126 Mass. 434 (1879).

A deed contained the following restrictions: "That no building except the ordinary out-houses shall be placed upon said lots, or either of them, of less value than four thousand dollars, and all buildings erected thereon shall set back from the line of the several streets shown on said plan, at least twenty feet, nor shall any building erected on said land be used for a livery stable or tenement house, or for any manufacturing purposes, for the period of ten years." Held, that the limitation of ten years was not confined to the restriction relating to manufacturing purposes, its nearest antecedent, but related to all of the restrictions. *Best v. Nagle*, 182 Mass. 495, 65 N. E. 842 (1903).

The court said: "All the restrictions are imposed by a single sentence. . . . As the whole deed is not before us, we assume that there is nothing in the other parts of it which would affect the meaning of this sentence. The agreed facts are not of matters which have a necessarily controlling bearing on the precise question, which is whether the closing words 'for the period of ten years' govern the whole restrictive clause. Probably it may be the fact that all the parties to the deeds which contained restrictive clauses couched in the same words that the best use which the lots into which the

whole tract was divided could then be put was to sites for detached dwellings, of considerable cost. Yet if the grammatical rule which ordinarily refers a qualifying word or phrase to its nearest antecedent should be applied with absolute strictness, it is clear that after the expiration of ten years the whole or any part of the tract could be used for manufacturing purposes. With this use permitted after ten years, the further continuance of the other restrictions would detract from the convenience of the land as a site for manufacturing establishments, and tend to impair rather than to enhance the value of the lots included in the scheme. . . . So far as punctuation goes, the words in question are separated by a comma from everything which goes before, and no punctuation marks except commas are found in the sentence. The argument from the position of the words is not of sufficient force to control the meaning of the sentence read as a whole and in connection with the general purpose of the deed."

A deed of conveyance provided, "that the said grantee or his heirs or assigns shall not for a period of ten years erect on the granted premises any buildings or parts thereof which shall be used or occupied for any other purposes than dwelling houses and private stables, and buildings usually appurtenant to dwelling houses, except the corner lots, which may be used for store purposes, and said dwellings to be occupied by none but respectable families, and that no building or part of any shall be erected within fifteen feet of the front line of each lot, and that no dwelling house shall be erected thereon to cost less than" a specified sum. Held, that the words "for a period of ten years" covered all of the provisions. *Re Welsh*, 175 Mass. 68, 55 N. E. 1043 (1900). In this case the court, through Chief Justice Holmes, said: "My brethren are of opinion that the ruling of the court should be sustained. Had the decision rested with me alone I probably should have ruled the other way, upon the ground that grammatically the limitation 'for a period of ten years' comes between the words 'shall not' and 'erect,' and qualifies only a distinct restriction. But it seems to them that the structure of the whole paragraph is too confused for the argument from grammar to be of much force; that it is rather to be inferred, looking at the restric-

tions all together, that the time limitation was intended to apply throughout; that at least the words are so doubtful that they should be taken the more strongly against the grantor; and that the construction adopted is helped by the consideration that the other one would make the petitioner's lot almost useless."

A lot of ground was conveyed "for the purpose of the public worship of God, and the erection, on said premises granted, of a church or meeting house for said worship, as also a house for a clergyman, and a school house." The deed contained the further provision that "this grant is upon this further condition, that the land hereby conveyed shall be forever hereafter appropriated to the maintenance and support of the public worship of God, as herein before specified, and to no other uses or purposes whatever." It was held that this second provision in the deed was repugnant to the first provision, and was void. *Canal Bridge Proprietors v. Methodist Religious Society*, 54 Mass. (13 Met.) 335 (1847). "It is not only another and further condition superadded to those which preceded it," said the court, "but they are repugnant, and cannot both be complied with; so that a compliance with one would be a violation of the other. If the last condition requires the grantees to appropriate the entire premises exclusively to the purposes of public worship, it is impossible to comply with the other condition, to erect a school house and parsonage."

Land was conveyed subject to the following restrictions:

"That the party of the second part, his heirs or assigns, shall not at any time previous to September 1, 1903, erect, or cause or procure, permit or suffer to be erected upon the said premises, any building other than a store or dwelling having a stone or brick foundation, and having at least two stories above such foundation, which building shall not be used for any other purpose than as a store or dwelling, within the time above limited. That no dwelling shall be erected nearer than ten (10) feet to the street line. It is, however, understood and agreed that stables and barns may be erected upon the rear half of the said premises, which buildings shall, however,

be used only as stables and barns, and shall be kept clean and free from nuisance.

"It is expressly agreed, that no wines, beers or liquors of any kind shall be sold or manufactured upon said premises.

"No two-story clothes poles shall be erected on the said premises."

Other land in the same vicinity was conveyed by the grantor with restrictions similar in many respects to these with a provision similarly inserted fixing the time prior to which they were to be operative as September 1, 1903. Held, that all the restrictions terminated on September 1, 1903. "If the framer of the restrictions," said the court, "had intended that any of them should continue after the 1st day of September, 1903, he should have so provided by clear and unambiguous language. This he has not done." *Armstrong v. Griffin*, ... N. J. Eq. ..., 91 Atl. 1016 (1914).

§ 47. Variance between contract for sale of, and deed to, property.

The general rule is that all prior stipulations and writings are merged in the contract to which they relate. "When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties. 'No rule of law is better settled than that where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed.' " 2 Devlin, Real Estate & Deeds (3rd ed.), sec. 850a.

Where there is a variance between the provisions of a contract for the sale of land relating to restrictions to be imposed upon the use of such land, and the language of the restrictions as they appear in the deed of conveyance, the latter is controlling. *Harris v. Roraback*, 137 Mich. 292, 100 N. W. 391, 11 Det. Leg. N. 251, 109 Am. St. Rep. 681 (1904).

In this respect it was said by the court: "The decision of this case depends upon the proper construction of the restric-

tion in the deed. We cannot agree with defendants that the force of this language is in any way impaired by the fact that the land contract which preceded the deed contained the words 'dwelling house,' instead of the words 'one dwelling house.' If these two expressions have the same meaning, the land contract cuts no figure in this case. If they have different meanings, there is nothing to indicate that full force shall not be given to the language of the deed, which was the last expression of the parties. In my judgment, we can safely construe the restriction from its own language, and without looking outside that language."

A contract for the sale of a lot contained a clause to the effect that the vendors would provide that no building should be erected on the lot adjoining on the west nearer than three feet of the line dividing the two lots. In the deed of conveyance, however, no covenant was inserted touching this question. It was held, however, that the vendee of the land was entitled to rely upon the vendor's undertaking in the contract for the sale of the land to protect him from the erection of a building on the adjoining lot in violation of such clause. *Supplee v. Cohen*, 81 N. J. Eq. 500, 83 Atl. 373 (1912).

Parol evidence has been held admissible to show a verbal agreement restricting the use of land on the ground that it is not the office of a deed to express the contract of sale, but to pass the title pursuant to the contract. "Therefore, a parol agreement, being a part of the consideration for the sale, restricting the use of the premises in one particular, for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parol evidence to prove such an agreement is no infringement of the rule that parol evidence is not admissible to contradict, vary or explain a written instrument." *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218 (1892).

§ 48. Covenant to build.—Time for performance.

A covenant by a grantee to erect a dwelling on the land to cost not less than a specified sum, cannot be enforced against a subsequent purchaser who takes the land ten years after its conveyance to his grantor and long after breach of the cove-

nant to build. It was held that, no time being specified within which the grantee was required to build, it must be done within a reasonable time. *Hurley v. Brown*, 44 N. Y. App. Div. 480, 60 N. Y. Supp. 846 (1899).

§ 49. Whether a provision is a condition or restrictive covenant.

Conditions are not favored by the courts because they tend to destroy estates and, if it is doubtful whether a clause is a condition or a covenant, it will be construed to be a covenant, so as to avoid forfeiture, and the grantor will be left to an action for damages for its breach, even though the clause may be designated as a condition by the instrument in which it is contained. *Rockwell v. Utz*, 79 N. Y. Misc. 120, 139 N. Y. Supp. 529 (1913).

If there is any doubt whether a provision is a restrictive covenant or a condition, it will be held to be the former. *Seaboard Air Line R. Co. v. Anniston Mfg. Co.*, ... Ala. ..., 65 So. 187 (1914).

As forfeitures are not favored, a clause in a deed will be construed to be a covenant rather than a condition subsequent, when such construction will not do violence to the language used. *Freer v. Glen Springs Sanitarium Co.*, 131 N. Y. App. Div. 352, 115 N. Y. Supp. 734 (1909).

Conditions subsequent are those which in terms operate upon an estate conveyed and render it liable to be defeated by breach of the conditions. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. *Hawley v. Kafitz*, 148 Cal. 393, 83 Pac. 248, 113 Am. St. Rep. 282 (1905).

The rule is that courts do not favor a construction that will impose a condition subsequent leading to a possible forfeiture of estate; by which is meant, of course, not that the court will refuse to recognize such a condition, when it clearly appears

that it was intended the estate should terminate upon its occurrence, but that it will be inclined to adopt, if it fairly can, a construction which will save the estate and remit the party in whose favor the obligation is created to an action for damages. *Union Stock Yards Co. v. Nashville Packing Co.*, 140 Fed. 701, 72 C. C. A. 195 (1905).

Whether or not the recitals in a deed create an estate upon condition or constitute a mere covenant, must be ascertained not alone from its recitals, but from a construction of the entire instrument, looking always to the intention of the parties, giving to any technical words employed the meaning intended by the parties, so far as ascertainable from the instrument, rather than their technical meaning. *Self v. Billings*, 139 Ga. 400, 77 S. E. 562 (1913). The question is to be determined from the language employed, the situation of the parties, their relation to the subject of the transaction and the object in view. *Union Stock Yards Co. v. Nashville Packing Co.*, 140 Fed. 701, 72 C. C. A. 195 (1905).

Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate on condition. There must be language used which is so clear as to leave no doubt that the grantor intended an estate upon condition subsequent should be created. *Hawley v. Kafitz*, 148 Cal. 393, 83 Pac. 248, 113 Am. St. Rep. 282 (1905).

An agreement limiting the use of premises is a covenant, not a condition, and its violation will not work a forfeiture of the estate or right granted. *Graves v. Deterling*, 3 N. Y. St. Rep. 128 (1886).

In an action by a grantor to compel a forfeiture of the grantee's estate under a deed on account of his failure to comply with certain provisions thereof, parol evidence is not admissible to show that a condition subsequent was intended to be created. *Hawley v. Kafitz*, 148 Cal. 393, 83 Pac. 248, 113 Am. St. Rep. 282 (1905).

§ 50. — intention of parties.

In ascertaining whether the intention of the parties was to create a covenant or condition, it is necessary to consider the

language employed, the situation of the parties, their relation to the subject of the transaction, and the object in view. *Shreve v. Norfolk & W. R. Co.*, 109 Va. 706, 64 S. E. 972, 23 L. R. A. (N. S.) 771 (1909).

Terms which, taken by themselves, import a condition, are frequently construed to be covenants, while terms which, taken by themselves, import covenants, are frequently construed to be conditions; or, stated in a different way, the intent of the parties is gathered from the construction of the whole instrument, regardless of the technical meaning of the terms used. If it be doubtful whether a clause in a deed be a covenant or condition, courts of law always incline against the latter construction, if they can reasonably do so in order to avoid forfeiture. And for the same reason words in a deed not in form either of a covenant or condition will be construed to be a covenant, rather than a condition. *Minard v. Delaware L. & W. R. Co.*, 139 Fed. 60 (1905), affirmed in 153 Fed. 578, 82 C. C. A. 586.

§ 51. — where the deed declares the purpose of the grant.

There seems to be no authoritative sanction for the doctrine that a deed is to be construed as a grant on condition subsequent solely for the reason that it contains a clause declaring the purpose for which it was intended that the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.

The law will give force to words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, if properly expressed, and will hold them to create a confidence or trust, or amount to a covenant or agreement on the part of the grantee, but the words *ea intentione* do not make a condition.

The absence of any right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which it was conveyed, will not, of

itself, make that a condition which is not so framed as to warrant in law that interpretation. *Shreve v. Norfolk & W. R. Co.*, 109 Va. 706, 64 S. E. 972, 23 L. R. A. (N. S.) 771 (1909). A condition will not be raised by implication from the mere declaration in the deed that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition. *Faith v. Bowles*, 86 Md. 13, 37 Atl. 711, 63 Am. St. Rep. 489 (1897); *Foreman v. Sadler*, 114 Md. 574, 80 Atl. 298 (1911).

Where land is conveyed for certain purposes and there is no provision for re-entry for condition broken, or words indicating an intention that the appropriation of the premises to any other purpose should defeat the estate granted, the provision does not constitute a condition. *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503 (1891).

Where a deed of conveyance of land prohibits its use for certain purposes, but does not contain the words "upon condition" or any provision for re-entry in case of a breach, the prohibitory clause is a negative covenant. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 144 (1896), affirming 59 Ill. App. 581 (1895).

To give the right of reverter through the courts it should be expressed in the instrument that, by devotion of the land to a purpose other than that indicated, the whole estate should revert to the grantor and his heirs. *Thornton v. Natchez*, 88 Miss. 1, 41 So. 498 (1906).

§ 52. — significance of absence of forfeiture or re-entry clause.

The presence of a re-entry clause, while not indispensable, is always important as evidence of an intention to impose a condition subsequent. Such a clause may make certain that which in its absence is left open to construction. *Druecker v. McLaughlin*, 235 Ill. 367, 85 N. E. 647 (1908).

Where a right of forfeiture is expressly reserved and is reasonable, and a right of re-entry is not expressly reserved, the latter right, being a necessary incident to the former, will be implied. *Smith v. Eagle Coal & Mercantile Co.*, 170 Mo. App. 27, 155 S. W. 886 (1913).

A deed of land to a religious society provided in the habendum clause that it was granted to "each and every person who may hereafter become lawful owners and proprietors of a pew in the meeting house to be built and erected thereon, and which may and shall afterward be built thereon by the said proprietors and their successors, to the use and behoof of the said proprietors for the said purpose, and of each and every lawful owner and proprietor of a pew or pews in the meeting house to be built and rebuilt on said lot of land forever." Such deed contained no provision for forfeiture or re-entry, and was held not to constitute a grant upon condition that a meeting house should be erected and maintained upon the land conveyed. *Packard v. Ames*, 16 Gray (Mass.) 327 (1860).

A conveyance of land was made "upon the conditions, however, that the premises shall be used solely for the purpose of erecting, furnishing, keeping, and maintaining thereon an academic or collegiate school for the purpose of educating the young people and students in the higher as well as the more common and useful branches of education, . . . and for no other purpose whatever." Held, that the clause created a conditional estate in the grantees, and that a re-entry clause was not essential to authorize the grantor to terminate the estate by re-entry after a substantial breach of the conditions. *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10 (1901).

A conveyance of land to a railroad company for "depot and other railway purposes," and stated to be in consideration of the railroad company agreeing to erect and maintain a depot on the land, but not containing any clause of forfeiture or right of re-entry for failure to do so, was held to vest a fee simple estate in the grantee, and that the statement of the purpose for which the land was conveyed constituted merely an agreement or covenant on the part of the grantee to use the land for that purpose. *Shreve v. Norfolk & W. R. Co.*, 109 Va. 706, 64 S. E. 972, 23 L. R. A. (N. S.) 771 (1909).

A covenant in a deed providing that the property conveyed is for church purposes, is a restriction and not a condition subsequent, as there is no right of re-entry reserved for its breach. *St. Stephen's Protestant Episcopal Church v. Church*

of the *Transfiguration*, 130 N. Y. App. Div. 166, 114 N. Y. Supp. 623 (1909), reversing 59 N. Y. Misc. 560, 112 N. Y. Supp. 403 (1908).

§ 53. — technical or appropriate words.

While conditions subsequent may be created without the use of technical words, they must be clearly expressed as they are not favored in law. Hence, words in a deed, not in form expressing either a covenant or condition, but sufficient to create either the one or the other, will be construed as a covenant rather than a condition. *St. Peter's Church v. Bragaw*, 144 N. C. 126, 56 S. E. 688, 10 L. R. A. (N. S.) 633 (1907).

There are certain words which are considered appropriate to create a condition; but when these apt words are used the provision is not always construed as a condition, and without these words conditions have been found to exist when such appears to be the intention of the parties. If it clearly appears by the deed that it was the intention of the parties that upon a breach of the restriction the estate conveyed to the grantee should be defeated and return to the grantor, such a restriction is a condition. And if it is found that a provision in a deed is a condition, then a breach of that condition works a forfeiture of the estate, and there is a right of re-entry in the grantor without express provision for forfeiture and re-entry. *Ball v. Milliken*, 31 R. I. 36, 76 Atl. 789 (1910).

The circumstance that the deed uses the language that the estate is granted upon condition is not conclusive, and will not be controlling if upon other considerations it appears that such was not the intention of the parties. *Union Stock Yards Co. v. Nashville Packing Co.*, 140 Fed. 701, 72 C. C. A. 195 (1905).

§ 54. — conveyance with or without consideration.

There is a marked distinction in the rule as to what language is sufficient to constitute a conditional estate when used in a devise or purely voluntary conveyance, and that which is sufficient for such purpose when used in an ordinary deed for a valuable consideration. In the former case such an estate

may be created by any words which declare that the land is given for a certain purpose or with a particular intention, while in the latter case the rule is more strict, it being necessary that the words be conjoined in the deed with others giving a right to re-enter or declaring a forfeiture in a specified contingency. Where the conveyance contains no apt or proper words to create a condition, but simply declares that the land shall not be used for any other than a specified purpose, it merely has the effect of creating a confidence or trust in connection with the land conveyed, or to raise an implied agreement on the part of the grantee to use the land only for the purpose specified. *Ecroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741 (1898).

§ 55. — provisions held to be covenants.

A provision in a deed recited that the premises shall be kept and maintained for the purpose of erecting and maintaining an institution of learning thereon subject to the usages and discipline of the M. E. Church. Held, not to constitute a condition, a breach of which would cause a reverter of the land to the grantor. *Davis v. Jernigan*, 71 Ark. 494, 76 S. W. 554 (1903).

A deed of conveyance of land contained a stipulation between the grantor and grantee to the effect that the land was granted and accepted upon the express agreement of the grantee to build a house of specified value on the premises within a limited time, and that such obligation was a part of the consideration of the conveyance. Held, that the stipulation was a mere personal covenant on the part of the grantee, and did not constitute a condition subsequent. *Hawley v. Kafitz*, 148 Cal. 393, 83 Pac. 248 113 Am. St. Rep. 282 (1905).

An express stipulation by the parties that, "this deed is upon the express agreement," implies a personal covenant, and not a condition. *Hawley v. Kafitz*, 148 Cal. 393, 83 Pac. 248, 113 Am. St. Rep. 282 (1905).

A deed of conveyance to land in fee contained the following clause: "It being expressly understood by the parties that the said tract or parcel of land is not to be put to any other purpose than that of a depot square, and that no business or

improvements are to be put on the tract except that which is immediately connected with the Western and Atlantic railroad." Held, to constitute a covenant, and not a condition, and that a remedy for a breach thereof was by action for damages, and not a forfeiture of the estate. *Thornton v. Trammell*, 39 Ga. 202 (1869).

A deed conveying to trustees of a congregation "a certain lot or tract of land to be used as a church location," and further "to have and to hold the said premises as above described unto the party of the second part and their successors in office forever," was held not to restrict the title to the period of time the lot was used as a church location. *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364 (1905). The court said: "It will be noticed that the words, 'to be used as a church location,' stand alone, and that the words 'upon condition' are not used in connection therewith. That is to say, it is not used in the deed that the premises are conveyed upon condition that they are to be used as a church location. Nor is there any provision in the deed for re-entry by the grantor in case of a breach of the covenant, if it be a covenant, that the premises are to be used as a church location. There is nothing in the form of the language here employed to indicate that it was intended that the conveyance was upon a condition subsequent. The words, 'upon condition,' do not occur, and there are no other words of equivalent meaning. There is no clause providing that the grantor shall re-enter in any event, and these are the usual indications of an intent to create a condition subsequent."

A provision in a deed conveying a strip of land abutting on a block laid out into lots, reciting that the deed is upon the express condition that the grantee shall keep the premises open as a private way for the benefit of purchasers of the lots "forever or until the same shall be taken or condemned" for a street, was held to be a covenant and not a condition subsequent. *Druecker v. McLaughlin*, 235 Ill. 367, 85 N. E. 647 (1908).

The plat of an addition to a town showed a dotted line across the north end of the lots, twenty feet south of the north line, marked "line of front of buildings." The lots were con-

veyed by their numbers on the plat. After the granting clause in the deeds were the words, "together with the exclusive use of the court-yard between said lots and the street," thereby referring to the twenty-foot strip, "upon condition that such yard shall only be used as a front-door yard, and that said party of the second part shall put no building upon said yard except front-door steps, nor erect any fence of unusual height, which shall obstruct the view of the neighborhood." And further, "It being the intention of the party of the first part, in reserving said court-yard, to benefit and improve the neighborhood, said reservation to continue for fifteen years from the date of the record of the plat of said subdivision; after the expiration of said term, the fee of said court-yard shall vest in said party of the second part, his heirs and assigns, without any further conveyance." There was no provision for forfeiture for breach of condition. Held, that the estate was not one on condition, and that the title vested in the grantee to the whole of the lot, and that there was simply a limitation upon the use of the twenty-foot strip for fifteen years. *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. 687 (1889).

The habendum clause in a deed contained the following: "To have and to hold same unto the said parties of the second part, their heirs and assigns forever, on condition and in trust that they shall erect a suitable building, or buildings, for a school, or seminary of learning, and that same shall always be devoted to school purposes, whether retained by said association or be passed into the hands of others." Held, to constitute a covenant and not a condition subsequent. *Carroll County Academy v. Gallatin Academy Co.*, 104 Ky. 621, 47 S. W. 617 (1898).

A tract of land was conveyed on full consideration, "for a public school house, and for no other purpose." Subsequently the land was sold and used for residence purposes. Held, that the words did not create a condition subsequent. *Faith v. Bowles*, 86 Md. 13, 37 Atl. 711, 63 Am. St. Rep. 489 (1897).

A piece of land was conveyed with the following provision in the deed: "Provided that no building shall ever be erected on said lots of land or on either of them within ten feet of the streets as exhibited on said plan." A later conveyance

was made with the following clause: "On condition that no building shall ever be erected on said lot within ten feet of said plan (street) as laid down on said plan." The use of the word "plan" as first appearing in the provision was a mistake for street. Still later the land was conveyed and the deed recited that, "the premises are sold subject to the condition that no building shall ever be erected on the granted premises within less than ten feet from said street." It was held that the clauses constituted mere restrictions, and not conditions. *Cassidy v. Mason*, 171 Mass. 507, 50 N. E. 1027 (1898).

A deed conveyed land subject to the "restrictions and conditions" that no building erected thereon should be used for certain trades or callings, nor be erected within eight feet of the street. A breach of such provision, it was stipulated, should not work a forfeiture of the estate, but would give a right of entry to remove the building. Held, that the provision was not a condition, but a restriction, which was valid and enforceable, although unlimited as to time. *Tobey v. Moore*, 130 Mass. 448 (1881).

An express stipulation in a deed that a dwelling house should be moved or erected on the land within three years, at a cost of not less than a specified sum, was held not to create a condition. *Stone v. Houghton*, 139 Mass. 175, 31 N. E. 719 (1885).

A recital in a deed that the land is conveyed to the grantee "for the uses and purposes of a burial place and to be forever kept, used and enclosed in a decent manner to and for no other use or purpose whatsoever," was held not to create a condition subsequent, a violation of which would work a forfeiture of the estate. *Thornton v. Natchez*, 88 Miss. 1, 41 So. 498 (1906).

Where the use of water conveyed across certain land was restricted to use for a paper mill, its use for a time for a cotton factory did not forfeit the right to its use for the paper mill, although such restriction could be enforced. *Wells v. Chapman*, 4 Sandf. Ch. (N. Y.) 312 (1846).

A clause in a deed which stated that, "Provided always, and this indenture is made upon condition, that the said party

of the second part, her heirs or assigns, shall within two years from the delivery of this deed, build upon each lot of the said premises, a dwelling house which shall cost not less than five thousand dollars," was held to be merely a covenant and not a condition. *Rockwell v. Utz*, 79 N. Y. Misc. 120, 139 N. Y. Supp. 529 (1913).

A provision in a deed that the property conveyed should not be used as a cemetery has been held not to be a condition, but a restrictive covenant the observance of which will be enforced by equity. *St. Peter's Church v. Bragaw*, 144 N. C. 126, 56 S. E. 688, 10 L. R. A. (N. S.) 633 (1907).

"In this connection," said the court, "it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the present possessive clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor or his heirs to re-enter, yet its absence to that extent frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. We may say that there is no interest which is not adequately protected by regarding the clause as intended to create a covenant or limitation in trust that the property shall not be used for the one certain purpose mentioned. It is more agreeable to reason, as it is to conscience, and it well comports with the character and origin of the deed containing the provision against use of the premises as a cemetery, if we hold that the office of the latter was simply to restrain the generality of the preceding clauses. The clause under consideration has no provision for forfeiture, while the next and last clause has one, showing merely the former was intended to operate as a covenant, and not as a condition subsequent, a breach of which may involve a forfeiture of the estate conveyed by the deed."

A provision in a deed of conveyance to a city that "no buildings for any other municipal purpose than that of a city hall shall ever be erected upon the granted premises," was held to be a mere declaration of the use intended, and not to create a condition subsequent. *Ecroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260, 79 Am. St. Rep. 741 (1898).

One Arms conveyed land by warranty deed which contained

the following clause: "Conditioned that no building or erection is ever to be made on said land, except a dwelling house and out-buildings for the same, or such other buildings and erections as would not affect the rights, privileges, and interests of said Arms, or his heirs or assigns, to a greater degree than a dwelling house and out-buildings as aforesaid would affect his and their rights, interests, and privileges; the said Arms being now the owner of a house and land westerly of, and near, said premises;" and conditioned, also, that "No building is to be erected on said land, which shall extend more than twenty feet southerly of the main body of the dwelling house now owned and occupied by the said John Arms." It was held that this clause did not constitute a condition precedent or subsequent; nor a covenant that the grantee would abide by the terms thereof; but was a part of the description of the estate, or interest, which passes by the deed to the grantee, and showed, with the rest of the description, what rights in the land passed to the grantee, and what were left remaining in the grantor; and that, the land passing to the grantee with the use thereof thus restricted, those claiming under the grantee could not make erections thereon in violation of those restrictions. *Fuller v. Arms*, 45 Vt. 400 (1873).

§ 56. — provisions held to be conditions.

A deed of conveyance recited that, "provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof." Held, that the clause constituted a condition, and not a covenant, and its breach worked a forfeiture of the estate. *Gray v. Blanchard*, 25 Mass. (8 Pick.) 284 (1829).

A deed to land provided that, "said party of the second part hereby covenants with said party of the first part, under penalty of forfeiture of the estate hereby conveyed, that, previous to the first day of July, 1866, he shall erect on said lot of ground a substantial dwelling house." Held, that the provision created a condition subsequent, as it was the evident intention of the parties to the deed, that a failure to build

a house within the time specified, should defeat the grant. *O'Brien v. Wagner*, 94 Mo. 93, 7 S. W. 19, 4 Am. St. Rep. 362 (1887).

A lot was conveyed "subject to the following conditions and limitations, viz.: the building to be placed thereon to be erected as soon as the first day of January, 1896, and no intoxicating beverages shall ever intentionally be permitted to be manufactured, sold, given away or consumed within or upon said premises or any part thereof, and the said grantee is required to use all reasonable diligence to prevent a violation of this condition. A substantial compliance with the foregoing requirements shall be deemed essential to the validity and permanence of the title hereby conveyed." Held, that the provision relative to the erection of the building was a condition subsequent. *Baker v. Woman's Christian Temperance Union*, 57 N. Y. App. Div. 290, 67 N. Y. Supp. 949 (1901).

A provision in a deed that "this deed is upon condition, that no buildings shall ever be erected upon said premises nearer to Olive street than the house of H. G. Otis now stands," was held, to create a condition as distinguished from a limitation or covenant. *Adams v. Valentine*, 33 Fed. 1 (1887).

CHAPTER III.

POWER OF STATES TO RESTRICT THE USE OF PRIVATE REAL PROPERTY.

- § 57. Generally.
- § 58. Regulation of height of buildings.
- § 59. Compensation for loss.
- § 60. Regulation of building line.
- § 61. Regulation relating to dwellings not applicable to hotels.
- § 62. Denial of the equal protection of the law.

§ 57. Generally.

In the exercise of its police power in the interest of the public safety, health or morals, legislatures may regulate the erection of buildings on private property. Of course, the exercise of the police power in this respect is controlled by the general rules of law applicable to the exercise of such power in relation to other subject matters. *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 18 N. E. 862 (1888); *Cochran v. Preston*, 108 Md. 220, 70 Atl. 113, 23 L. B. A. (N. S.) 1163 (1908).

In *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314 (1899), it was said: "Regulations in regard to the height or mode of construction of buildings in cities are often made by legislative enactments in the exercise of the police power, for the safety, comfort, and convenience of the people and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned."

The Supreme Judicial Court of Massachusetts has held that, in the exercise of the police power the legislature may regulate and limit personal rights and rights of property in the interest of the public health, public morals and public safety. The general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power.

The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as to materially exclude sunshine, light and air, and thus to affect the public health. It may also increase the danger to persons and property from fire, and be a subject for legislation on that ground. These are proper subjects for consideration in determining whether, in a given case, rights of property and the use of land should be interfered with for the public good. Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactment in the exercise of the police power, for the safety, comfort, and convenience of the people and the benefit of property owners generally. The right to make such regulations is too well established to be questioned. It is for the legislature to determine whether the public health or public safety requires such a limitation of the rights of land owners in a given case. *Welsh v. Swasey*, 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160 (1907).

§ 58. Regulation of height of buildings.

A statute was enacted in Massachusetts respecting the height of buildings to be erected in the city of Boston, and provided for the appointment of a commission to divide the city into districts to be classed as districts A and B, and provided as follows: "In the city of Boston no buildings shall be erected to a height of more than one hundred and twenty-five feet above the grade of the street in any district designated A, and no building shall be erected to a height of more than eighty feet above the grade of the street in any district designated B. These restrictions shall not apply to grain or coal elevators or sugar refineries in any district designated A, or to steeples, domes, towers or cupolas erected for strictly ornamental purposes, of fireproof material, on buildings of the above height or less in any district." It was held that the statute was within the power of the legislature to enact. In respect of the power of the commission to make rules and regulations under the statute, however, the court held that it does not follow that all rules and regulations made under such a delegation of authority would be constitutional, merely because the original statute is unobjectionable. Such rules

may be tested by the courts to see whether they are reasonably directed to the accomplishment of the purpose on which the constitutional authority rests, and whether they have a real, substantial relation to the public objects which the government can accomplish. *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160 (1907).

§ 59. — compensation for loss.

A statute of Massachusetts limiting the height of buildings then being built or thereafter to be built or rebuilt or altered in the city of Boston within a specified territory to a height of ninety feet, provided for the payment of damages to any person owning or having an interest in an uncompleted building begun before the taking effect of the act, and for compensation to all persons sustaining damages to their property by reason of the limitation of the height of buildings prescribed by the act. Held, that the act was constitutional. *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314 (1889); affirmed in *Williams v. Parker*, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559 (1903).

Here the court said: "In view of the kind of buildings erected on the streets about Copley Square and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power as other statutes regulating the erection of buildings in cities are commonly passed. But it differs from most statutes relative to this subject in providing compensation to persons injured in their property by the limitations which it creates. In this respect it conforms to the constitutional requirements for the taking of property by the right of eminent domain. Looking to all its provisions in connection with the place to which they apply, it seems to have been intended as a taking of rights and property for the benefit of the public who use Copley Square. It adds to the public park rights in light and air and in the view over adjacent land above the line to which buildings may be erected. These rights are in the nature of an easement created by the statute and annexed to the park. Ample provision is made for compensation to the owners of the servient estates. In

all respects the statute is in accordance with the laws regulating the taking of property by right of eminent domain, if the legislature properly could determine that the preservation or improvement of the park in this particular was for a public use." A similar statute was upheld in *Parker v. Com.*, 178 Mass. 199, 59 N. E. 634 (1901).

If such a statute can be given a reasonable construction which will sustain it as constitutional, the court will so construe it, although its passage by the legislature may have been requested or advocated on a ground which would not be a constitutional justification for its enactment. *Attorney General v. Williams*, 178 Mass. 330, 59 N. E. 812 (1901).

§ 60. Regulation of building line.

Mr. Lewis, in his work on Eminent Domain, in referring to statutes and ordinances attempting to establish building lines on a street, whereby the abutting owners are prohibited from placing any building within a specified distance of the street line, says: "Such a law deprives the owner of the lawful use of his property, and amounts to a taking thereof within the meaning of the constitution, and, consequently, can only be carried out by making provision for the compensation of the owner." 1 Lewis, *Eminent Domain* (3rd ed.) sec. 227. To same effect is *Hawkins v. Pittsburg*, 220 Pa. St. 7, 69 Atl. 283 (1908).

A statute, known as the "Boulevard Law," which provided that a city with a population of three hundred thousand inhabitants and more might establish a building line on a boulevard to which all structures thereon were required to conform, was held by the Supreme Court of Missouri to be unconstitutional, as violative of the constitutional provision that no person should be deprived of property without due process of law, and also as being contrary to the provision that private property shall not be taken for public use without just compensation. *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226 (1893).

In this case it was urged on behalf of plaintiff that there had been no "taking" of private property under this law and an ordinance enacted by virtue thereof, because the "title"

to the property and right to use the same are still in the defendant. The court held, however, that as the word "property" included the unrestricted right of use, enjoyment and disposal, of that object, it follows that anything which destroys or subverts any of these essential elements is a taking or destruction *pro tanto* of property, and though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the *locus in quo*.

"The use of a given object," said the court, "is a most essential and beneficial quality or attribute of property; without it all other elements which go to make up property would be of no effect. If the city were allowed to deprive the defendant of the use of his entire lot, it would leave in his hands but a barren and barmecidal title; and what is true of property rights as integer is true of each fractional portion. If plaintiff's theory be correct, then the city could pass and enforce an ordinance, which would deprive defendant of the use of his entire lot, and still there would be no 'taking' within the terms of the constitution, and consequently, no right to compensation. The statement of such a position is sufficient to accomplish its utter repudiation."

"The day before the ordinance went into operation, defendant had the unquestionable right to build at will on his lot; the day afterwards, he was as effectually prevented from building on the forty-foot strip, except under peril of punishment, as if the city had built a wall around it, and this too without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."

A statute enacted by the legislature of New York provided that, "No buildings, or other erections, except porches, piazzas, fences, fountains and statuary, shall remain, or at any time be placed upon any of the lots fronting upon Eastern Parkway, from Washington avenue easterly to the extension of Eastern Parkway, or upon the extension of said Eastern Parkway to Ridgewood Park, within thirty feet from the line or sides of said several streets respectively." Held, to be uncon-

stitutional as being an attempt to deprive the abutting owners of the full and complete use of their property without just compensation. *People ex rel. Dülzer v. Calder*, 89 N. Y. App. Div. 503, 85 N. Y. Supp. 1015 (1903).

A statute providing that all new buildings fronting on a court of less width than twenty feet shall recede so that the court shall be of that width, was held to be constitutional, but that the owners of land affected thereby were entitled to compensation. *Re Perry's Court*, 10 Phila. (Pa.) 27 (1873).

A statute of the state of Virginia authorized the councils of the cities and towns of that state among other things, to "Make regulations concerning the building of houses in the city or town, and in their discretion, in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings and to regulate the height of buildings." *Acts of Va.*, 1908, p. 623. By virtue of this act the city of Richmond enacted the following ordinance: "That whenever the owners of two-thirds of property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish said line so that the same shall not be less than five feet nor more than thirty feet from the street line." The ordinance provided a penalty for its violation. It was held that the ordinance invaded the constitutional guaranties of rights of property, and was therefore invalid. *Eubank v. Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 723 (1912).

In regard to the ordinance in question and its declared invalidity, the Supreme Court of the United States said: "It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use, but the kind

of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power on such property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and, viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interest of others. The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of the line, between five and thirty feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed. We are testing the ordinance by its extreme possibilities to show in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property rights of others, and properly determined, as the case may be for business or residence,—even, it may be the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power. The case requires no further comment. We need not consider the power of a city to establish a building line or regulate the structure or height of buildings. The cases which are cited are not apposite to the pres-

ent case. The ordinances or statutes which were passed on had more general foundation, and more general purpose, whether exercises of the police power or eminent domain. Nor need we consider the cases which distinguish between the esthetic and the material effect of regulations the consideration of which occupies some space in the argument and in the reasoning of the cases."

It is held that the owner of land cannot be affected by proceedings on the part of a city for the establishment of a street building line, unless due notice thereof was given him or his authorized agent. Otherwise he would be deprived of property without having an opportunity to be heard, in violation of the due process of law clause of the constitution. *Northrop v. Waterbury*, 81 Conn. 305, 70 Atl. 1024 (1908).

In Connecticut it has been held that where a building line was established by ordinance and acquiesced in by all parties interested therein for a period of ten years, that the right of complainant to build within the restricted portion of her lot was so doubtful, that in an action of mandamus by her to compel the board of building commissioners of the city to issue a permit to her to build in front of such line, the writ would be refused. *State ex rel. Berger v. Hurley*, 73 Conn. 536, 48 Atl. 215 (1901).

§ 61. Regulation relating to dwellings not applicable to hotels.

A statute providing that the height of all dwelling houses and of all houses used or intended to be used as dwellings for more than one family, thereafter to be erected in the city of New York, shall not exceed eighty feet upon all streets and avenues exceeding sixty feet in width," was held not to apply to hotels, but to be applicable principally to tenement and apartment houses. *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 18 N. E. 862 (1888).

In this respect the court said: "In determining statutes the words used should receive their ordinary and popular import; and, according to general usage, a dwelling house is not a hotel and a hotel is not a dwelling house. Sometimes it may be that the words 'dwelling house' should, for the pur-

pose of giving the statute its intended effect and operation, embrace hotels. But such an unusual and extended meaning should not be given to the words unless it can plainly be seen that such was the legislative intention. Here we have no reason to suppose that the legislature intended the act should apply to hotels. As simple, private dwelling houses are rarely, if ever, built eighty feet high, the main purpose of the act must have been to regulate the height of tenement and apartment houses, which are becoming very numerous in New York, which are usually built in the midst of dwelling houses and in which several families live and carry on the operations of housekeeping. There is not the same reason for regulating the height of hotels not usually built in the midst of dwelling houses, which are mainly occupied by temporary adult guests, which are under the supervision of one management and which can never become very numerous. While stores, factories, warehouses, buildings for offices and numerous other buildings may be erected without any restriction as to height, we can see no reason to suppose that the language used in this act was meant to embrace hotels, nearly all of which in the city of New York have for many years been erected of greater height than the limit prescribed in the act."

§ 62. Denial of the equal protection of the law.

The legislature of Maryland passed a statute providing, "That from and after the date of the passage of this act, no building, except churches, shall be erected or altered in the city of Baltimore on the territory bounded by the south side of Madison street, the west side of St. Paul street, the north side of Center street, and the east side of Cathedral street, to exceed in height a point seventy feet above the surface of the street at the base line of Washington Monument."

It was contended in regard to this statute that its purpose, which did not appear upon its face, and was therefore a subject open to inquiry, was and is to preserve the beauty and architectural symmetry of the environment of Washington Monument, and that in the exercise of the police power property rights cannot be impaired for purely esthetical purposes. The court held, however, its object was not alone to preserve

the architectural beauty of the locality, but also to avoid increased danger from fire incident to very high buildings, and was not invalid as being a denial of the equal protection of the law. *Cochran v. Preston*, 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163 (1908).

In justification of this statute the court in the case last cited said: "We find a more substantial reason for its enactment in the suggestion of the counsel for the appellees, that its purpose was to protect the handsome buildings and their contents, located in that vicinity, and also the works of art clustered there from the ravages of fire. It must be remembered that in the center of the prescribed territory to which the statute applies, stands the lofty and beautiful monument to the illustrious Washington; on one corner of the Mt. Vernon Place and Washington Place is the handsome Mt. Vernon Methodist Episcopal Church, on another is the Peabody Institute, a stately marble building in which are kept for public use many rare and valuable books and works of art, to replace which would be well nigh impossible; in the same neighborhood are numerous handsome residences of private citizens, containing valuable works of art and literature."

The court further called attention to the fact that during the session of the legislature at which the statute under consideration was passed, a great fire visited Baltimore and destroyed a large part of the business section of that city. It stated that great impetus is given to such a fire by very tall buildings. They serve as so many large funnels furnishing draft for the flames, thereby intensifying the heat, and out-reaching the efforts of the firemen.

In relation to the rule that in the exercise of the police power property rights cannot be impaired for purely esthetical purposes, the court in the case last considered said: "Such is undoubtedly the weight of authority, though it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of the power even for such purposes."

CHAPTER IV.

RESTRICTIONS RELATING TO BUILDINGS AND THEIR LOCATION.

- § 63. Building defined.
- § 64. Not confined to dwelling house.
- § 65. Private stable.
- § 66. Fence.
- § 67. Brick wall.
- § 68. Pavilion.
- § 69. Billboard.
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- § 71. L. added to existing building.
- § 72. Covenant relating to "erection" of buildings not applicable to existing buildings.
- § 73. "Build" includes increasing height of building.
- § 74. Semi-detached building.
- § 75. Bay window, as violative of restriction against building.
- § 76. Porch, as violative of restriction against building.
- § 77. Porch and bay window, as violative of restriction against building.
- § 78. Steps, as violative of restriction against building.
- § 79. Steps and platform, as violative of restriction against building.
- § 80. Balcony extending into space restricted against being built upon.
- § 81. Piazza, as violative of restriction against building.
- § 82. Veranda, as violative of restriction against erection of dwelling within certain space.
- § 83. Eaves, as violative of restriction against building.
- § 84. Roof and dormer window, as violative of restriction against building.
- § 85. Addition to building as violative of building restriction.
- § 86. "Usual projections" from buildings.
- § 87. Restrictions relating to "wall" of building.—Projections.
- § 88. Restriction establishing "front line" of building.—Awning projecting.
- § 89. Reference to building as meaning walls of building.
- § 90. Building line dependent upon future construction of buildings.
- § 91. "Equidistant," and not less than certain distance from street.
- § 92. Restriction as to L. not applicable to building without L.
- § 93. "Outbuildings."
- § 94. Garage.

§ 63. Building defined.

A building is defined to be a structure in the nature of a house built where it is to stand; as commonly understood, a house for business, residence, or public use, or for shelter of animals or storage of goods, and very generally, but not always, the idea of a habitation for the permanent use of man, or an erection connected with his permanent use, is implied in the word "building." 1 Words & Phrases, 889.

It has been judicially declared that when a person covenants that he will not erect a building within a specified distance from the line between his and the adjoining property, he necessarily covenants that he will not erect any part of a building within the distance named. It was said that to read into such a covenant a reservation that it shall apply to only the main body of the building and shall not apply to projecting bay windows or eaves is clearly without justification unless circumstances exist to warrant the conclusion that such a reservation was intended by the person. Covenants of this nature are generally recognized as designed to afford a given space for air, light, and view, and an occupancy of such restricted space by a portion of the building would necessarily be a violation of the spirit of such covenants as thus understood. *Supplee v. Cohen*, 81 N. J. Eq. 500, 83 Atl. 373 (1912).

§ 64. — not confined to dwelling house.

A covenant against the erection on land of any building to cost less than three thousand dollars, was held not to prohibit the erection of any structure other than a dwelling house, because the word "building" has a broader significance. *Ronan v. Barr*, ... N. J. Eq. ..., 89 Atl. 282 (1913). In this case the court said: "The complainants contend that the word 'building' means dwelling house, and that it should be so construed. This is inadmissible. Definition refutes the argument. It cannot be gathered from the context of the covenant that the parties intended the word 'building' to imply a certain kind of building. To interpret the word 'building' to mean dwelling would prevent the erection of a church, a theater, a municipal building, a hotel or private club house, which without doubt was not within the contem-

plation of the parties. I cannot read into the covenant a restriction which the parties did not agree to."

§ 65. — private stable.

A restriction that "no building shall be erected upon the granted premises to cost less than twenty-five hundred dollars, and but one building, one private stable excepted, shall be erected or placed thereon," is not violated by the erection on the premises of a private stable costing twenty-five hundred dollars without any other house or building. *Peck v. Hartshorn*, 189 Mass. 110, 75 N. E. 133 (1905).

In this respect the court said: "The word 'building' is used several times in the restrictions and there is nothing to show that it is used in an exclusive sense. The restriction that no building shall be placed within fifteen feet of the street would apply as well to a stable as to a dwelling house. And the exception of a private stable from the restriction that 'no building shall be erected,' etc., classifies a stable as a building within the meaning of the restriction. In no event can there be more than two buildings, one of which may be a private stable erected on the lot. The restriction as to costs applies as well to stables as to other buildings. As the restriction is drawn there is no limit to the kind or character of buildings that may be erected so long as it costs twenty-five hundred dollars; nor is there anything forbidding the erection of a private stable, except as an adjunct to or in connection with a building already on the lot or in process of erection. It is possible that the scheme contemplated the sale of lots for the erection of dwelling houses, with the right to erect a private stable in connection with or as an adjunct to a dwelling house on the lot but not otherwise. If so, the restrictions embodied in the deeds have failed to accomplish the purpose intended. But we must take them as they stand, and there is nothing in the circumstances under which the deeds were given to warrant the construction contended for by the plaintiff."

§ 66. — fence.

A covenant not to erect a "building" within a certain distance of the rear line of a lot has been held under the circum-

stances of the particular case to preclude the covenantor from erecting a fence which would have the effect of shutting off light and air from the premises in question. *Wright v. Evans*, 2 Abb. Pr. (N. S.) (N. Y.) 308 (1867).

The court said, in part: "The situation of the premises, as I have said, when the contract for the sale of the defendant's lot was entered into, and the acts of the parties immediately thereafter, indicate very plainly what was their mutual understanding as to the nature of the restriction which the plaintiff imposed, when she contracted to sell the lot; and if the defendant were allowed to do what he had been enjoined by the court from doing, it would practically deprive the plaintiff of the benefit which she intended to secure by this covenant in her deed. It appears by the affidavit which she has submitted, that the first story, which is now used for a kitchen, is lighted in the same way that it was before the alteration was made, and that there is no way of lighting it except from the rear of defendant's lot: so that this part of the dwelling would be as effectually deprived of light, and I might almost say, of air, as if, instead of the wooden fence, the defendant were to erect in the open space in the rear of his lot, what might be technically denominated a 'building' of a corresponding height with that of the proposed fence. It is very clear to my mind, that to allow him to put up this fence would be in direct contradiction of the intent of the parties as expressed in the instrument, and I am, therefore, of opinion that the injunction was properly granted."

A restriction to the effect that the property conveyed shall be used for, and occupied by, one building only, and that it shall extend no nearer the street than a certain designated line, is violated by the erection of a board fence eight or more feet in height, extending entirely through the restricted portion of the premises to the sidewalk, which shuts off the view from the grantor's remaining ground and dwelling house, diminishes the light and air formerly enjoyed by him, and which is contrary to the apparent intention of the parties, as evidenced by the stipulations in the deed and the circumstances and condition of the property at the time of the conveyance. *MacGregor v. Linney*, 27 Ohio Cir Ct. Rep. 490

(1905). "While we are not prepared to say that all fences are buildings," said the court, "we think that the structure here complained of and denominated a fence comes clearly within the meaning of the word 'building' as used in the deed. In coming to such conclusion we have considered the situation of the parties at the time the deed was executed and their intention as shown by the use of said words in the light of all the circumstances and conditions of the property."

§ 67. — brick wall.

A deed provided that no building erected on the land should be less than two stories in height, exclusive of the basement and attic, or have exterior walls of any other material than of brick, stone or iron, or be erected within ten feet of the street. A brick wall six feet in height, with a coping not exceeding one foot in height, to be used as a fence or wall, was held not to violate the restriction. *Nowell v. Boston Academy of Notre Dame*, 130 Mass. 209 (1881). Taking into consideration the restriction referring to the building as being two stories in height, as having a basement and attic, and as having exterior walls, it was held that the wall was not a "building" within the meaning of the restriction. "Throughout the deed," said the court, "the word is manifestly used in its ordinary sense, to denote a structure or edifice enclosing a space within its walls and usually covered with a roof, such as a house, a church, a shop, a barn or a shed. The wall which the defendant proposes to erect cannot in any just sense be called a building within the meaning of the restriction."

A restriction that no dwelling or other house or building or any part thereof or projection therefrom should be built thereon within sixty-five feet of the street line, is not violated by the construction within the restricted space of a brick wall, extending from a house on the land, and built on part of a retaining wall as a screen; it not being any part of or projection from the house, within the terms of the restriction. *Clark v. Lee*, 185 Mass. 223, 70 N. E. 47 (1904). "We are of the opinion," said the court, "that the covenant or restriction applies only to the house to be built upon the land, and not to a wall, even if the wall extends from the house into

the restricted space. Such a wall as was here built extending from the house cannot be deemed to be 'any part of, or projection' from, the house. These words evidently refer to bay windows or porches, or things of that nature."

§ 68. — pavilion.

An owner of land deeded a portion thereof and covenanted not to build on a certain part of the remaining lands, the object being to secure an unobstructed view of the ocean from the grantee's premises. Held, that the construction of a pavilion with a roof, and open sides, on the land in question, constituted a violation of the restriction, and the fact that complainants had added a portico to their buildings extending onto the land in question, is no excuse for the building of the pavilion by the defendants. *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961 (1889). The court said: "The pavilion . . . is a frame structure open on all sides, with a roof which appears, in the plan or diagram presented, to be at an angle of thirty degrees, and is about eighteen feet above the surface of the ground. The defendants insist, that the erection of this pavilion, is not a violation of the covenant, and urge that this has been the understanding of all the parties interested in the land in question, whatever may be the expression in the deed. It is urged that the acts of the complainants and other purchasers prove this. For, whilst they have located their buildings thirty feet from the easterly line of said avenue, they have added porches or porticoes in addition thereto over a large portion of the said thirty feet. It is insisted that the complainants, who have done this, have no right to object to the construction of this pavilion similar in its features, so long as they allow their own portico to be maintained on the said thirty feet."

"In the first place, there is no possible ground for saying that there is ambiguity in the covenant in this case; and in the second place, if there was, as the defendants allege in their answer, and as their counsel urge upon the argument, an understanding between the parties, at the time of the execution of the conveyance, that such porticoes might be erected, then surely the defendants are estopped from complaining

of such erection and of making it an excuse for any breach of the covenant on their part. It does not appear in the covenant, nor from any other source, that the erection of pavilions or any other structure which might have the appearance of a portico, separate or independent of a dwelling-house or hotel, might be erected on the said thirty feet by the said defendant Backarack, or in any one in privity with him, without being regarded as a violation of such covenant."

§ 69. — billboard.

Whether or not a billboard (or bill posting hoarding, as it is termed in England) should be considered a building depends upon the circumstances of its use; in short, it depends upon the intention of the parties to the agreement relating thereto.

Land was conveyed subject to a restrictive covenant on the part of the grantee that "no building should be erected thereon for manufacturing purposes nor for the carrying on of any noisy, noisome, offensive, or dangerous trade or calling, nor as a public house or retail shop," and that no steam engine should be erected thereon. A billboard, of a permanent nature, fifteen feet high and one hundred and fifty-six feet long, covered with advertisements, was erected along the boundary of the land. It was held that the hoarding constituted a "building" within the meaning of the covenant, and that there was carried on upon it the trade or business of a bill poster. *Nussey v. Provincial Bill Posting Co.*, 25 T. L. Rep. 489, (1909) 1 Ch. 734, 100 L. T. Rep. 687, 78 L. J. Ch. 539, 53 Sol. Jo. 418, 2 B. R. C. 425.

In the opinion of the master of the rolls in this case he stated that he by no means intended to affirm that in every contract a billboard is a building; but that this hoarding is, within the terms of the covenant.

Land was conveyed with a restrictive covenant "that any building which shall hereafter be erected upon the said piece or parcel of land secondly hereinbefore described fronting the Spring Bank aforesaid shall be at least thirty-six feet in height from the level of the said flagged path, and shall have a stuccoed or cemented front and a slated roof, and that any

building which shall hereafter be erected on the said piece of land firstly hereinbefore described shall be at least twenty-two feet from the level of the said flagged path, and any buildings thereon which face the east shall have a stuccoed or cemented front, and any buildings facing north shall be fronted with white stock bricks and have slated roofs, and such buildings respectively shall be used only as dwelling houses, and that no tenements or other outbuildings shall be erected upon the said pieces or parcels of ground or upon any part thereof, respectively, to be occupied as tenements, or as courts or squares or otherwise separately from the said front messuages or dwelling houses." The land was surrounded by a wooden fence from four to six feet in height, which was subsequently pulled down and there was erected a billboard supported by struts and outposts, from twelve to fourteen feet in height, and used for the purpose of posting advertisements. Held, that the billboard was not a building within the terms of this covenant. *Foster v. Fraser* (1893), 3 Ch. 158, 69 L. T. Rep. 136, 63 L. J. Ch. 91, 42 Wkly. Rep. 11, 57 J. P. 646, 3 Reports 635.

In this case the court said that the principal question involved was whether the hoarding (billboard) constituted a "building" within the meaning of the covenant. He stated that there had been cited a number of cases, all of which were instructive as to how the court defines the word, and he referred also to the etomological view, but said that they are only useful as a guide how to deal with the meaning of the word. He then continued: "Ultimately, the question comes to this, what is the meaning of the word in this particular document? Is what has been erected a 'building' within the meaning of this covenant? That is not a question at all easy to answer for this reason. The covenant is not expressed in language as full as one could wish, and no doubt the construction is rendered a little more difficult by the fact that it does not show the protection it is intended to effect, and nothing is said about the purposes for which it is put in; it is put in without introduction or explanation. Now, observe that this is not a building agreement; this is not an agreement or conveyance in which the grantee is bound to do

anything. The grantee or purchaser can do what he likes with the land; according to the deed he is at liberty to leave the property uncovered by anything at all; he can convert it into a market garden, a winter garden, or anything else. So long as no building is erected he may use the land for any purpose whatever. The deed does not contemplate that he should at any time build anything; there is no express covenant to build anything, but what is covenanted is this: if you build, your building shall be of a particular kind; 'shall have a stuccoed or cemented front and a slated roof.' Can a hoarding have a stuccoed or cemented front and a slated roof? Then again, 'any buildings facing north shall be fronted with white stock bricks and have slated roofs.' A hoarding such as this cannot be fronted with white stock bricks or have a slated roof. The meaning of the covenant is, if you erect buildings then they shall be of a certain character, 'and shall be used only as dwelling houses.' In my opinion the covenant is restrictive; that is to say, it does not relate to anything which cannot have a front or a roof; and it would be pushing the covenant too far to consider that the parties contemplated a hoarding. I hold, therefore, that the words of the covenant do not point to anything of the kind, and that such a hoarding as this is not a 'building' within the meaning of the covenant."

It has been held that the erection of wooden hoardings for the purpose of advertisement on premises constituted a violation of a covenant not "to erect or make any other building or erection on any part of the demised premises." *Pocock v. Gilham*, 1 Cab. & El. 104 (1883). It will be noticed that this covenant is slightly differently worded than some of those heretofore considered. It contains the word "erection," and in deciding the case the court did not state whether the hoarding constituted an erection or a building. The hoarding was of wood and erected against the side of the dwelling house on the premises, and on the top of a parapet wall, by nails and holdfasts driven into the walls of the building.

§ 70. — monument.

A monument may, of course, take the shape of a memorial

hall or other building, but that is not the general sense of the word and will not be presumed, and standing alone will not be taken to mean a building.

A provision that "no part of said ground, lying in the southward of the state house within the wall as it is now built, shall be made use of for erecting any sort of buildings thereon, but that the same shall be and remain a public green and walk forever," is not violated by the erection on said ground of a monument consisting of a statue upon a pedestal. *Society of the Cincinnati's Appeal*, 154 Pa. St. 621, 26 Atl. 647, 20 L. R. A. 323, 32 Wkly. N. Cas. 249 (1893).

Said the court: "A statue upon a pedestal, even though the latter be large, is not a building in the popular meaning of the term, and in no proper sense can it be said to interfere with the devotion of the ground to public use as an open ground or walk. On the contrary the consensus of art and taste over the civilized world is that the green of public parks is the most appropriate place for national monuments of this kind."

§ 71. — L. added to existing building.

A deed conveying a lot, which fronted on a street, provided that "no dwelling house or other building shall be erected on the rear of said lot," and stated that the building then on the lot conformed to the requirement. Held, that an L. erected on the rear of the house extending the full height of the house, and almost to the rear line of the lot, was a violation of the provision. *Sanborn v. Rice*, 129 Mass. 387 (1880).

§ 72. Covenant relating to "erection" of buildings not applicable to existing buildings.

A covenant in a deed to a lot that the grantor, in the conveyance of certain other land, would include a covenant in the deeds providing that houses erected thereon should be erected a certain distance from the street line, does not require that the grantor move an existing house on part of such land and nearer to the street line than the distance specified in the covenant. *Buck v. Backarack*, 45 N. J. Eq. 557, 17 Atl. 548 (1889).

§ 73. "Build" includes increasing height of building.

In a deed to lands the grantor covenanted not to build on a certain portion of his remaining lands on the easterly side of a certain avenue, the object being to secure an unobstructed view of the ocean from the grantee's premises. Held, that the elevation of buildings on the grantor's lands would be enjoined as well as the erection of new buildings. *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961 (1889).

"It is admitted," said the court, "that the bath-houses have been elevated at least eighteen inches higher than they were at the time of the making of said covenant. I regard this elevation and any other similar additions or constructions, whether attached to the old erections, or detached and entirely new, as a clear violation of the covenant."

§ 74. Semi-detached building.

An apartment house with a vertical dividing wall extending the whole height of the building with seven or eight apartments on each side and no communication between them, was held to constitute two semi-detached buildings, and when erected on a lot having a frontage of forty feet, constituted a violation of a restriction providing that, every building erected upon every such lot shall be either detached or semi-detached; every such detached building shall have appurtenant to it land having a frontage of at least thirty-three feet, and every such pair of semi-detached buildings shall have appurtenant thereto land having a frontage of at least fifty feet. *Holden v. Ryan*, 22 Ont. Wkly. Rep. 767, 3 Ont. Wkly. N. 1585, 4 D. L. R. 151 (1912).

§ 75. Bay window as violative of restriction against building.

Projected or swell fronts or "bays," which extend to the full height of the buildings, from the basements to the roofs, and are on a continuous foundation with the building, and which are an essential part of the building, are violative of a restrictive covenant establishing a building line when they project into the restricted space. *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84 (1910).

A restrictive covenant against the erection of any building upon a certain portion of the lot conveyed, excepted from its provisions, porches, steps, and bay windows. The owner commenced the erection on the restricted portion of his lot of what he termed a bay window, the same resting upon foundations built in the ground and extending more than seven feet beyond the building line into the restricted portion. Held, that the erection was merely a bay window and did not constitute a violation of the restriction. *Keith v. Goldsmith*, 194 Ill. 488, 62 N. E. 866 (1902).

A restriction against the erection of a building within a certain distance of a lot line, was held not to be limited by the use of the word "building" to the main body of the structure erected, but included an overhanging bay window. *Supplee v. Cohen*, 81 N. J. Eq. 500, 83 Atl. 373 (1912); *Kneip v. Schroeder*, 166 Ill. App. 215 (1911).

The projection of a bay window about fifteen inches into the restricted space is violative of a covenant requiring twenty feet open space between houses on adjoining lots. *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158 (1913).

The purchaser of a plot of land, which was part of an estate laid out for building, covenanted with the vendor not to erect any building on his plot nearer to the road to which it was situate than the line of frontage of the then present houses in that road, which houses were about forty feet apart, and about eighty feet from the road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the then existing houses, and carried from the foundation up to the roof. It was held that such bay windows were buildings, within the meaning of the covenant, and consequently their erection constituted a violation of such covenant. *Manners v. Johnson*, L. R. 1 Ch. Div. 673, 45 L. J. Ch. 404, 24 Wkly. Rep. 481 (1875).

In construing this covenant the court said: "I should have thought we did not want surveyors' certificate or scientific witnesses to expound the meaning of that word 'building' as contained in that covenant. When you find that part of the main structure of the house (that is, the portions of the house forming the bays) are carried up from the foundation, it ap-

pears to be clear that such parts are buildings within the meaning of the covenant. Although the defendant has not in fact, on one side of the house, done more than put a bow on one floor, yet if his contention is right, he is entitled to carry the bow of the house up to the top. This I refer to as testing whether the additions to the main building can be considered as not within the covenant. If he could do that, I do not see why he should not have bows over the portico, and by degrees extend the whole frontage. It is not necessary for me to say anything as to whether a mere projection as distinguished from a portion of the main building would be within the covenant."

The mere fact that a bay window rises from a foundation in the ground, instead of being a mere projection outward from the wall some distance from the ground, does not make it any the less a bay window, within the meaning of a restrictive covenant. *Keith v. Goldsmith*, 194 Ill. 488, 62 N. E. 866 (1902).

A restrictive covenant provided that no house should be built on the land in question unless placed back at least fifteen feet from the line of the street. The grantee erected a dwelling house on the land, with a bay window extending into the restricted portion. The bay window was built up from a foundation wall, which constituted the only foundation to that part of the house. Held, that the bay window must be considered as the house within the meaning of the covenant. *Righter v. Winters*, 68 N. J. Eq. 252, 59 Atl. 770 (1905).

§ 76. Porch, as violative of restriction against building.

A restrictive covenant providing that no building shall be erected upon the land in question nearer than fifteen feet of the front line, was held to be violated by the erection of a massive porch three stories high, at each outer corner of which and midway between, there is a brick and stone pillar twenty inches square, extending from the ground to a height of thirty feet, with brick balustrades at each story and brick buttresses to the steps leading to the porch, the same being twenty-four feet in width and extending out from the main building a distance of eight feet, and extending into the re-

stricted portion of the lot. *O'Gallagher v. Lockhart*, ... Ill. ..., 105 N. E. 295 (1914).

A deed provided that "all buildings on said lot shall be erected not less than fifteen feet back from the fence line." There was built extending to within seven feet of the fence line a porch on brick foundations, roofed and permanently attached to the whole width of the front of a house. Held, that the porch was an integral part of the building within the meaning of the restriction, and was a violation thereof, notwithstanding the fact that it was open at the sides and front. *Ogontz Land & Imp. Co. v. Johnson*, 168 Pa. St. 178, 31 Atl. 1008, 36 Wkly. N. Cas. 307 (1895), reversing 14 Pa. Co. Ct. 86, 3 Pa. Dist. 642.

"The intention of this clause," said the court, "is plain. It is to widen the entire space between the house lines and secure the light, air, and open view incident to a wide street. The language is 'all buildings,' and that means all substantial parts of all buildings. While merely incidental encroachments on this space by steps, or eaves, or ornamental projections might not amount to violations of the agreement, yet a porch extending the whole width of the house as a substantial and integral part of it, is clearly so. If it can occupy eight feet of the reserved space, it could as well occupy the whole fifteen feet to the fence line, and thereby destroy the open uniform general effect meant to be secured."

A restriction that, "The party of the second part agrees to place all buildings on said lot 22 feet from the street line," was held to be violated by a porch, constructed in connection with a house erected on the lot, and extending to within 15 feet of the street line. *Schermerhorn v. Bedell*, 163 N. Y. App. Div. 445, 148 N. Y. Supp. 896 (1914).

A restriction prohibiting the erection on the premises in question of any building other than a residence with the customary outbuildings, and that such residence should be erected not less than a specified distance from the front line of the premises, was held to be violated by the erection of a residence so that the roof of its porch extended two feet and four inches over the restricted space, the pillars of which encroached five

inches thereon. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157 (1912).

The fact that the grantor and other grantees have built houses with porches extending within an area restricted against any house or building, does not justify another grantee in building a structure raised on posts and extending to an avenue entirely across the restricted space and which he intended to use for mercantile purposes. *Evans v. Mary A. Riddle Co.*, ... N. J. Eq. ..., 43 Atl. 894 (1899).

A lot was sold according to a plan which forbade the construction of a building thereon within forty feet of the street. The purchaser constructed thereon a brick dwelling house, the front building wall being forty feet from the line of the street, and between the house line and the street was a porch about seventy-seven feet long, projecting from the front wall of the house toward the street to a width of nine feet. The porch was built on a concrete foundation of like nature to that under the house. At each end of the porch columns supported a roof which attached to the house, and formed an open construction of roof and columns to cover the ends of the porch. Immediately in front of the entrance door he constructed a portico enclosed on both sides and extending six feet beyond the line of the house. It was admitted that the porch construction was not objectionable to the plaintiff, and he agreed that four decorative columns of a diameter of twenty inches each composing a portion of the portico or vestibule might remain as a part of the porch. From a plan and photograph submitted in evidence it clearly appeared that the porch was the greater violation of the restriction, if either was of that character. The court adopted the reasoning of the court below, which was as follows: "If the uncertain significance of the restrictive words be most liberally construed, they would apply to the main building line, and do not constitute such a restrictive covenant as would forbid a reasonable porch extending but four to six feet beyond the building. The plan and covenant may perhaps be possible of construction to prohibit outbuildings, but not in prohibition of ornament or mere reasonable ornamental structures which con-

form to the building." Injunction was denied. *Willock v. Arensberg*, 51 Pa. Super. Ct. 73 (1912).

A deed to property provided that buildings thereafter erected thereon "shall be built of brick, and set the same distance back from Third street as the house now erected on the southwest corner of Third and Oak streets, and shall be suitable dwellings for the neighborhood." Held, that it was intended that the front wall of buildings thereafter erected on the land should be on a line with the front wall of the house mentioned, and that it was permissible to erect a stoop, porch, or platform of reasonable width along the front of the buildings. *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506, 14 Ky. L. Rep. 502 (1892). "It seems to us," said the court, "too plain for dispute that the parties to the deed from Barrett to Matthews intended simply for the front wall of each building thereafter erected on said parcel of land to conform with the front wall of the house then standing at the corner of Third and Oak streets in respect to distance from Third street, and not to either inhibit erection, or prescribe shape or dimensions, of any porch, stoop, or platform the respective owners might choose to build. And such has been the interpretation of the deed by each person who has erected a dwelling house on that parcel of land, including appellee, for there projects from the house on the lot retained by Matthews next to the corner lot a covered platform and steps six feet, and from the house of appellee steps five feet; in addition to which is a bay window, extending from the second story, near to the roof, and projecting about three feet from the front of his house, while from the corner house there is a platform and steps projecting only four feet four inches. It is manifest that Barrett, the original grantor, expected there would be erected costly and showy dwelling houses on the land sold to Matthews, varying in designs to suit convenience, taste, or fancy of the respective owners, and consequently did not intend to restrict them in regard to size or shape of porches, stoops, or platforms. Therefore, unless the porch of appellant that appellee complains of projects an unreasonable distance beyond the front wall of his house, compared with like structures attached to houses of appellee and Matthews,

or unreasonably obstructs light and air, there is no cause of action against him, even if bound by the condition in the Barrett deed. The front wall of his house is on a line of the front wall of the corner house. The porch in question was, as stated by the architect, designed to be covered, but open; and it is not satisfactorily shown in what manner, if at all, light or air will be unreasonably obstructed by it. The only cause of complaint there can be is that it extends 6.7 feet nearer his property line than the main body of the house, which certainly does not authorize the judgment rendered, for such width of porch, attached to a house set back from the sidewalk, would not ordinarily, nor compared with projections for similar purposes from the houses of appellee and Matthews, should it be, regarded as unreasonable. We do not intend, however, to decide that there might not be such projections from one house as would seriously impair the value and usefulness of other houses on the same street, but simply that, looking to the condition as set forth in the Barrett deed, and the practical interpretation given to it by appellee himself, there is not enough in the record before us to justify interference."

A covenant in a lease provided that any building erected on the premises should be set back twenty feet from a certain line. Held, that it was not violated by the erection of an open porch which extended nearer to the line than the distance specified. *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076 (1896).

"Unless it can be said that this porch is a part of the building, within the meaning of the covenant, there was no breach of it," said the court. "Appellants maintain that it is such a part of the building, and cite several authorities to the effect that bay windows and like projections are a part of the house, within the meaning of such restrictions. On the other hand, counsel for appellee cites *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506, 14 Ky. L. Rep. 502 (1892), which seems to support the contrary contention. The condition is in the nature of a restriction or limitation upon the use of the property, and will not be enlarged by construction. If there is any doubt as to whether the porch is within its terms, that

doubt must be resolved in favor of the lessee. This rule is especially applicable to this case, since forfeitures are never favored in law nor enforced where injustice will result, if the language used will reasonably bear a construction leading to a different result."

It will be noted that the restrictive covenant in this case was in the form of a condition, the violation of which, it was provided, should work a forfeiture.

Complainant erected a porch in front of his residence which extended beyond a building line imposed on the property by a restrictive covenant. The purpose of the covenant was to secure and preserve the desirability of the street for private residence, and it did not appear that the porch substantially interfered with the easement of neighboring owners for light, air and view. It was held that the erection of the porch under the circumstances would not bar complainant of his right to enforce observance of the covenant against an adjoining owner who contemplated a substantial violation thereof. *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53 (1900).

A restrictive covenant provided that the main body of any building erected on the land should not be nearer the front property line than twelve feet, and provided that bay windows might be erected within the restricted space, provided they did not extend over two feet from the main body of the building, and that no building should be erected having its porch floor higher than nine feet above the established grade of streets bounding said lots. Held, that that part of the covenant referring to porches applied only to porches extending into restricted space. *Sailer v. Podolski*, 81 N. J. Eq. 327, 87 Atl. 458 (1913).

In this case the court said: "This porch covenant is undoubtedly explicit in its inhibition of porches more than nine feet above the street grade. It will be observed, however, that the covenant primarily relates to and restricts the location of the 'main body' of the building. Bay windows, which might be claimed to be a part of the main body of a building, are then permitted to extend two feet into the restricted

space. It follows that the covenant, being limited in matters of location to the main body of the building, clearly contemplates the erection of porches extending into the restricted space, but restricts their height. In reading this restriction touching porches in connection with the other parts of the covenant, it seems clearly impossible to say, with certainty, that it relates to porches other than those which extend into the restricted space. The porches here in question will not extend into the restricted space. The main body of the building is located so far away from the street that the proposed porches will be wholly between the main body of the building and the restricted territory. The rule that covenants of this nature, if vague or uncertain, cannot be enforced by this court has been applied by our court of last resort with strictness which clearly forbids preliminary relief in this suit based on the porch covenant."

§ 77. Porch and bay window, as violative of restriction against building.

The erection of a porch sixteen feet eight inches in width, extending into a portion of the lot restricted against buildings, and extending to the front line of the premises, with bay windows on each side, having their foundations on the ground, and rising therefrom five stories high, and approaching within a few inches of the front line of the lot, and constituting a part of a large building, constitutes a breach of a restrictive covenant against the erection of a building within a certain distance of the front line of the premises. *Du Bois v. Darling*, 12 Jones & S. (N. Y.) 436 (1879).

Evidence of a generally understood meaning common throughout a city among real estate dealers, builders, architects, and surveyors, that building line restrictions apply to the main front wall of a building only, and not to porches and bay windows, is immaterial in an action to enjoin the erection of a massive porch extending beyond a building line, where it is not shown that such a custom had prevailed generally among the grantees of the lots in the subdivision in question. *O'Gallagher v. Lockhart*, ... Ill. ..., 105 N. E. 295 (1914).

§ 78. Steps, as violative of restriction against building.

A restriction prohibiting the erection of any building other than a residence with the customary outbuildings, and providing that such residence should be erected not less than a specified distance from the front line of the premises, was held not to be violated by the placing of steps within the restricted space. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157 (1912). It was said in this case that the purpose of such a restriction is to prevent the encroachment of substantial parts of a building.

A restriction providing that no building should be erected on the premises nearer the street line than ten feet and that such ten foot strip should be kept open and unincumbered, except that light, open fences, not more than six feet high might be built to enclose the strip as a yard, was not violated by the projection of steps from the front of the house onto such restricted strip. *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492 (1912), affirmed in 81 N. J. Eq. 210, 86 Atl. 398 (1913).

On this question the reasoning of the court was as follows: " 'Open,' in one sense, unquestionably means absolutely without obstruction; and 'unincumbered' may be properly used, in some connections, as meaning absolutely without anything resting on or projecting over land. But when this whole covenant is read together I think its meaning is reasonably plain, and, further, that it is entirely plain that it cannot be given the broad construction contended for by the complainants. The obvious purpose of this covenant was to prevent the erection of a building within the ten feet. Every house was to have in front of it, that is, in front of its front line, ten feet of unbuilt-on property. It cannot be successfully argued that any such absurd results should be attributed to a construction of this covenant as to prevent that ten feet from having placed upon it anything. Surely walks could be built through it, and to that extent the land would be incumbered. Little copings along the sides of the walks to protect flower beds bordering the walks would surely not be within any reasonable construction of this covenant. And yet, if broadly construed, the walk itself and the coping on

projection along the side of it, put there for protection, would be an 'incumbrance' in some sense of that word, and probably not to be 'open'; that is, absolutely free of obstruction, within a broad and in some senses proper use of the word 'open.' I am of the opinion, on the one hand, that if the front of the building was ten feet from the line of the street, and then a covered porch projected from it into the ten feet, that would be part of the erection of the building, and would violate the covenant. On the other hand, I am of the opinion that it is within the meaning of this covenant to permit an approach by way of steps to rest on the said ten feet; and I do not think that, in the proper sense of this covenant, such steps caused the said strip of land to be unopened and incumbered, that is, violate the provisions of the covenant that the said strip of land should be open and unincumbered. In other words, I incline to the opinion that the obvious purpose of the covenant was to have in front of each house a strip of land ten feet wide across which the vision of the neighbors would be unobstructed, and that the prohibition was against the erection of anything upon or within the said ten feet which should prevent free observation across it. Read in this way, the restriction is entirely reasonable; the obvious purpose of it is served, and the owner of each lot is not deprived unreasonably of a perfectly proper use of his property. Read in the broad way that the complainants insist that it should be read, giving the most extreme meaning to each word of which each word is capable, the said strip of land would have to be left absolutely unimproved in any way, because anything placed upon it which nature had not placed there would then 'incumber' it, in the broadest sense of the word, and this is so entirely unreasonable that we discard it and search for the more reasonable construction."

§ 79. Steps and platform, as violative of restriction against building.

A deed to a lot established a building line thereon and provided that "no building or any part or portion thereof shall at any time be erected or placed upon the space between said building line and said street, nor shall any projection be

permitted to extend into or encroach upon said space, except that the steps and platform in front of the main door may extend over said building line not to exceed eight feet." It was held that the erection of a covered porch over the steps and platform, which was supported by columns resting on the platform and which extended into the restricted portion of the lot, constituted a violation of such restriction, and hence injunction would issue to require the removal of the roof and front pillars of the porch. *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911).

§ 80. Balcony extending into space restricted against being built upon.

A covenant that "not less than five feet in front of each of several lots" should "forever be an open space or court," and "that it should not, at any time thereafter, be appropriated or occupied by any edifice or building or wall, nor be in any manner built upon or obstructed otherwise than by the necessary steps for entrance, platforms, pedestals, and iron fences or railings, connected therewith and enclosing the same, and the foundations or copings upon which such iron fences or railings might be placed," was held not to be violated by the construction of a balcony, projecting from the first floor of a dwelling house on one of such lots extending into such space, the same being supported by brackets inserted in the front wall of the house, and having three enclosed glazed windows. *Perkins v. Coddington*, 27 N. Y. Super. Ct. (4 Rob.) 647 (1865).

The court said: "The first question that presents itself upon the construction of this covenant is, whether by the five feet which is reserved to remain an open court, is meant superficial dimensions of ground alone, or a like space in the air, reaching from such ground to the heavens. If the latter, the defendants could no more occupy it permanently than they could the public highway, or even temporarily, otherwise than they could such highway; but I think the subsequent part of such covenant confines such five feet to the ground—the *terra firma*—and its use. It declares that such

court shall not be occupied by an edifice, or a building or wall, each of which words implies something not suspended in the air, but resting on the ground and erected upwards from it, and, finally, it provides that it should not be built upon or obstructed otherwise than by a certain kind of solid structure. The terms "built upon" seems to me conclusive as to the space intended being of the solid ground, and the exception of the steps for entrance, and the pedestals therefrom (which are required to rest on the ground) more fully corroborates it. Particularly as the house owned by the plaintiff had at the time he bought it, steps resting on a solid wall reaching from the ground to nearly the first story. It is not difficult to suggest, according to the varying views and interests of the parties, different general purposes or limitations of such right intended by such covenants. But where a covenant is so precise and elaborate as this, and its enforcement is in derogation of common right, a court can do no more than carry out the stipulation of the parties as they have expressed it. It would be too much to say that it was intended to have an unlimited sweep of air over, and access of light to, the whole of the five feet, along a smooth wall unbroken by any projection, when there were already overhanging cornices, projecting ashlar and pedestals and a massive structure for the support of the steps to the entrance of both houses, at the time of their conveyance. If any general purpose can be extracted from such covenant consistent with its special provisions, it must be merely that the width of the street, so far as the main front wall of the building was concerned, should be increased five feet, and that the court yard thereby gained should not be built upon by any structure resting on the ground, except the entering steps and their appurtenances, but that blinds and their fastenings, and cornices projecting from or over the windows or door, or under the roof, and even balconies, might be permitted, provided they were not a mere evasion of the covenant. Such seems to have been the practical construction given to it, and acquiesced in for a long time, and until better advised I can see no reason for interfering with the window finally completed."

§ 81. Piazza, as violative of restriction against building.

A restriction reciting that "no building erected shall be placed at a less distance than twenty feet from" the street, is violated by a piazza, eight feet wide, covered by its own roof supported by posts, attached to and extending along the entire front of a house, and which extended into the reserved space. *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. 854 (1895). The court remarked that, "We can see no ground for a distinction between a piazza covered by an extension of the main roof of a house, and one covered by its own roof and attached to the house."

§ 82. Veranda, as violative of restriction against erection of dwelling within certain space.

A veranda is a part of a dwelling within the meaning of a covenant providing that "any and all dwellings erected thereon shall be erected not nearer than twenty-five feet to the front line of the lot," and under such covenant the building, including the veranda, should be set back at least twenty-five feet from the street line. *McDonald v. Spang*, 55 N. Y. App. Div. 332, 105 N. Y. Supp. 617 (1907).

§ 83. Eaves, as violative of restriction against building.

Where a restriction is placed upon a lot to the effect that no building shall be erected thereon nearer than a certain distance to the lot line separating the premises in question from the adjoining lot, the word "building" was held not to be limited to the main body of the structure erected, but to include overhanging eaves. *Supplee v. Cohen*, 81 N. J. Eq. 500, 83 Atl. 373 (1912).

It was contended in this case on behalf of the defendants, that the restriction must be understood to refer to the main body of the building, and not to overhanging bay windows or eaves. In this respect the court said: "I am unable to adopt that view. The covenant is that no building shall be erected nearer than three feet from the division line. The language used is entirely clear and exact and certain in its meaning, and in the absence of some circumstance sufficient to disclose that the parties used the language adopted by them

in a restricted sense, the covenant must be understood in accordance with the natural import of the language used. . . . The natural import of the language 'that no building shall be erected nearer than three feet from the party line' is that no part of a building shall be so erected."

§ 84. Roof and dormer window, as violative of restriction against building.

A deed provided that no building should be erected on the lot conveyed "within twenty feet of C street." Grantee erected a house thereon with the front wall twenty feet from the street, but the roof of which sloped towards and within less than fourteen feet of the street. This part of the roof covered a piazza, and was supported by posts six feet from the front wall of the house. There was a dormer window in this part of the roof by means of which a room in the second story was extended to within seventeen feet of the street. Held, that the part of the roof in question and the dormer window constituted an extension of the building and violated the restrictions. *Bagnall v. Davies*, 140 Mass. 76, 2 N. E. 786 (1885).

§ 85. Addition to building as violative of building restriction.

A lot was conveyed with the stipulation that the front line of any building erected thereon should be fifteen feet from the street on which the lot bounded, and the deed recited that the building then on the lot conformed to the condition. The front line of the building referred to was straight. The grantee built a rectangular addition to the front of the building eight or nine feet wide and projecting three feet three inches towards the street. It began four feet above the ground and extended to the top of the building. Held, that the stipulation was violated. *Sanborn v. Rice*, 129 Mass. 387 (1880). The addition in question was of iron frame, in which windows were set for the several stories of the house. The timbers supporting it were locked into the timbers of the several floors, and it had no other support. The court in its opinion stated: "We cannot regard this addition as an

ordinary projection, or variation of detail in the arrangement and ornamentation of the front of the house, which the parties to the deed may have contemplated as being proper under the provisions of the deed. The addition is in effect a removal of the front line of the house three feet and three inches nearer to the street than the deed permits. The effect on the adjoining estates is substantially the same as if the addition were supported by a wall rising from the ground perpendicularly to its front line, instead of being supported as it now is."

§ 86. "Usual projections" from buildings.

A deed conveyed a lot with the stipulation that no building should be erected within twenty feet of the street, "provided that steps, windows, porticos, and other usual projections appurtenant thereto, are to be allowed in said reserved space of twenty feet." The grantee built a house with the front wall the proper distance from the street, but in the front of the house he built a structure three and one-half feet high, extending from the wall of the house to the line of the street, the top of which was covered by turf, and the interior used for coal bins. Held, that this was a violation of the restrictions. *Attorney General v. Gardiner*, 117 Mass. 492 (1875). This structure was held to be no part of the defendant's dwelling house, nor a projection from or appurtenant to it, but to be of itself a building within the meaning of the restrictions.

A deed from the Commonwealth of Massachusetts conveying a lot of ground stipulated that any building erected thereon should be set back twenty-two feet from the street, "provided that steps, windows, porticos and other usual projections appurtenant thereto are to be allowed in said reserved space of twenty-two feet." The grantee erected a house of octagonal shape with the front wall, with the exception of about two feet at each end, projecting into the reserved space, in the form of a bay extending the entire height of the house, with foundation, roof, and windows. Held, that the restriction was violated, although such projections had been usual in that city for some years, and the Commonwealth subsequently changed its deeds in conveying

other lands in that city, to allow the erection of such projections. *Linzee v. Mixer*, 101 Mass. 512 (1869). "With every disposition on our part," said the court, "to give to the terms of the title deeds a liberal, rather than a narrow and technical, construction, we find it wholly impossible to adopt the defendant's interpretation as to the reserved space, without reducing it to a mere nullity. It is manifest, on inspection of the plans and drawings, that substantially the whole of the front wall of the defendant's house, from the foundation to the roof, encroaches upon, and occupies a large portion of the reserved space. It would be a mere abuse of language to describe so manifest an invasion of the forbidden ground as one of the 'usual projections appurtenant' to windows."

A deed from the Commonwealth of Massachusetts to a lot in Boston, provided that the front wall of any building erected on the land should be set back twenty-two feet from the street; that "porticos and other usual projections" appurtenant to said front wall were to be allowed in this reserved space, but that no projection other than door steps, balustrades, and cornices was to extend more than five feet into such space, and that "no projection in the nature of a bay window, circular front or octagon front, with the foundation wall sustaining the same (such foundation wall being a projection of the front wall), will be allowed." A building was erected on the land at a proper distance from the street, but a stone porch was added to a front corner of it which was fifteen feet high, with a slate roof seven feet high, and with solid side walls projecting at right angles with the front wall of the building, and, with slight exceptions in the lower courses of the underpinning, not extending more than five feet into the reserved space. It was held that this porch was a "portico" or other "usual projection" within the meaning of the restriction, and was not a "projection in the nature of a bay window, circular front or octagon front." *Attorney General v. Ayer*, 148 Mass. 584, 20 N. E. 451 (1889).

In its opinion in this case the court said: "Etymologically the words 'porch' and 'portico' are one. Formerly porch was used as synonymous with portico in its classic sense. The

tendency in modern times, no doubt, has been to diminish 'porch' to the shelter in front of the door of a building, and we are very willing to assume that, with the constant growth of distinctions and nice discriminations in the meaning of words, 'portico' retains more of the original suggestion of length and of a roof supported by pillars, among architects and scholarly persons, and that 'porch' is more specially appropriated to a smaller structure, generally with closed sides. But the distinction is not carefully preserved in common speech. With us portico, as well as porch, has shrunk, and usually means a shelter in front of a door. When porticos are cut down to the little structures which we all know, we think that special reference to the mode of support has vanished almost as completely as to the length. The parties to this deed did not mean by portico 'a walk covered with a roof, supported by columns at least on one side.' They meant the shelter to the door of a building, familiar to Massachusetts and to Boston. We are of opinion that they used it as a generic word, including a shelter with closed sides, as well as one with pillars. We agree that in determining the scope of the word we must look at the object of the restrictions and of the exceptions to it. But, as we have said, the permission extends to more serious structures, with closed sides, and therefore there is no reason for excluding porches. Indeed, a portico projecting not more than five feet would, or at least might, obstruct the view of a neighboring house with its pillars almost as completely as if its sides were closed."

A restriction in a deed from the Commonwealth of Massachusetts to a lot in Boston provided that the front wall of any building erected thereon should be set back twenty feet from the street, but that "porticos and other usual projections" appurtenant to such wall might project into the reserved space. Held, that the basement story of a building, surmounted by a balcony such as had never been usual in this country, was not a "usual projection" within the meaning of the restriction. *Attorney General v. Algonquin Club*, 153 Mass. 447, 27 N. E. 2 (1891).

In this case the court said: "Giving as wide a scope as we

deem permissible to the word 'other usual projections,' they must at least be such projections as were usual in this country at the time the deeds of the Commonwealth were given. If the builders desire a greater scope for ornamentation and variety in the erection of a building than this will allow, it must be obtained by setting back the front wall. Upon the facts stated, the projection of the basement story cannot be deemed a usual projection, within the meaning of the deeds; and whether the restriction was wise or not, and whether or not the enforcement of it will have a tendency to check elegant architecture, we cannot do otherwise than give effect to the meaning of the words, when once that meaning is ascertained."

**§ 87. Restrictions relating to "wall" of building.—
Projections.**

Where lots were sold under a general plan of improvement, a covenant providing that the main north wall of a dwelling to be erected on the granted land shall stand five feet from the north line of the lot, it was held to be so framed to align the houses in an open harmonious setting, and that it meant to locate the north wall exactly on a line five feet distant from the north line of the lot. "To construe it to read 'not nearer than five feet,'" said the court, "would miss its spirit and purpose, as it would violate its letter. Such a construction, making elastic the provision for the north building line, would let a purchaser build anywhere within the remaining fifty-five feet breadth of the lot, even up against its very south boundary." *Thompson v. Diller*, 146 N. Y. Supp. 438 (1914).

An agreement provided that in the erection of a building the main front wall should be placed twelve feet from the street. Held, that the erection of a stone stoop, or steps, extending the whole width of the twelve feet, was not an infringement of the agreement. *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206 (1873).

The court said: "The agreement was, that the main front wall of his house should be twelve feet from the line of Lagrange street, and it is not denied that his main front wall

is in conformity with his agreement. The object in reserving the twelve feet, and in making the stipulation that the houses on the other lots should be on a line of twelve feet from the line of Lagrange street, is evident. It was, that the complainant, and those who should build on the other lots, should have the advantage of the twelve feet for ventilation, light and prospect, and should have the benefit to arise to their property from placing their houses on the twelve foot line. The platform and steps are not an infringement either of the terms or spirit of the agreement."

It has been held that the construction of an open porch resting on brick piers, extending the entire width of the building, and projecting ten feet into the restricted part of the lot in question, was not in violation of the following covenant: "The parties hereto also, in consideration of the premises, further covenant and agree with each other, for themselves, their heirs and assigns, that the building line of the square shall be not less than twenty-five feet from the true street line, it being understood by them that the front wall of the building shall be set back at least twenty-five feet from the street line, and this covenant is to run with the land." *Spilling v. Hutcheson*, 111 Va. 179, 68 S. E. 250 (1910).

In this connection the court said: "Applying, as we do, the familiar principle that the language of the deed is to be construed liberally in favor of the grantee, we think that the porch does not form part of the 'front wall of the building.'"

A covenant against the erection of the front walls of any building within ten feet of the front line of the lot, was held to be violated by the construction of a three story bay window, with a stone foundation, which projected within the restricted portion of the lot. *Levy v. Schreyer*, 27 N. Y. App. Div. 282, 50 N. Y. Supp. 584 (1898), reversing 19 N. Y. Misc. 227, 43 N. Y. Supp. 199 (1897).

Relative to this question the court said: "This bay window is a portion of the front of the building, and the foundation upon which it is constructed is to that extent the front wall of the building itself. It is a part of the building, and en-

croaches upon the space which the defendant stipulated, when he accepted his deed, should be kept open."

A covenant that the main front wall of a house shall be not nearer than twelve feet from the street line, is broken by the erection of a bay window extending from the foundation the height of the first story and projecting nearer than twelve feet to the street line. *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206 (1873).

The court said: "This 'bay window' is not a projection from the wall of the house, but itself constitutes and is part of the wall. It is, indeed, all of the wall on the Lagrange street end, except eighteen inches at each corner. For eighteen inches from each corner of the building, on that end, the wall is at right angles to the front and rear walls of the house; the rest of the wall is a three-sided projection outside of the inner line of the strip of twelve feet, and occupying, at its widest part, four of the reserved twelve feet. It has a stone foundation, part of the foundation of the house. It is what is known as an 'octagon end,' by whatever other names it may be called, and is a clear violation of the agreement. That it is now proposed to build it no higher than the top of the first story, does not change its character, nor render it free from objection. It is impossible to resist the conclusion, that to permit its construction, would be to allow the defendants to frustrate the intention of the parties to the agreement."

A deed of conveyance to a lot contained the following covenant: "The parties hereto also, in consideration of the premises, further covenant and agree with each other, for themselves, their heirs and assigns, that the building line of the square shall be not less than twenty-five feet from the true street line, it being understood by them that the front wall shall be set back at least twenty-five feet from the street line, and this covenant is to run with the land." Shortly thereafter the purchaser erected a three story brick residence on the lot with a frontage of twenty-six feet two inches; twelve feet of this space being occupied by a bow front or window, the foundation of which in common with the remaining outside walls, rose from the ground. The bow front was two

stories high, and was not separated from the space it enclosed by an inner wall, and it projected over the building line slightly more than four feet. Held, that such structure constituted a violation of the restriction. *Spilling v. Hutcheson*, 111 Va. 179, 68 S. E. 250 (1910).

**§ 88. Restriction establishing "front line" of building.—
Awning projecting.**

A restrictive covenant "that the front lines of any messuages, dwelling houses or other buildings which may at any time be erected upon the premises hereby granted fronting towards Thirteenth Street aforesaid shall recede eight feet from the northerly line of said Thirteenth street, which space of eight feet between the front line of said messuages, dwelling houses or other buildings and the said northerly line of said Thirteenth street, is forever to be left open as and for court yards in front of such buildings respectively," is not violated by the construction of an awning extending into such space, which for twenty-five feet in front of the building, extended thirteen feet from the house line, and for the remaining width of the building extended to the curb line, the roof of which awning was of translucent glass, and was supported by five posts, three of which were eight feet from the front of the building and two at the curb, none of the posts being in the court yard space. *Olcott v. Sheppard Knapp & Co.*, 96 N. Y. App. Div. 281, 89 N. Y. Supp. 201 (1904), affirmed in 185 N. Y. 584, 78 N. E. 1108 (1906).

In this regard the court said: "Taking all of the evidence into consideration as to the construction of the awning, I am of the opinion that it is not a violation of the covenant referred to. That covenant contemplates that the space shall be kept open so far as building upon it is concerned. The restriction is 'that the front lines of any messuages, dwelling houses or other buildings shall recede eight feet from the northerly line of said Thirteenth street.' The awning certainly is not covered by the words 'dwelling houses or other buildings,' nor do I think it is covered by the word 'messuages,' which, in the sense here used, is synonymous with dwelling house. It is no more part of the building than an

ordinary awning would be. The court yard space certainly is much more free and open than is that in front of the plaintiff's dwelling, and she holds the title to her lot subject to the covenant above quoted. It is difficult to see, therefore, how she is in a position to invoke the equitable powers of the court to restrain the defendant from doing that which she is herself doing. A court of equity favors only worthy claimants."

§ 89. Reference to building as meaning walls of building.

Where a covenant in a deed provides that the front of any dwelling house erected on the granted lot shall not be nearer the street than a dwelling on an adjacent lot, has reference to the front walls of both houses, which must be in line with each other, and the erection of a house the front wall of which is on a line with the front of the porch of the adjacent house is a violation of such covenant. *Burton v. Stapely*, 4 Ohio N. P. (N. S.) 65, 17 Ohio Dec. 1 (1904), affirmed in 74 Ohio St. 461, 78 N. E. 1120.

§ 90. Building line dependent upon future construction of buildings.

A restriction to the effect that buildings to be erected on the land conveyed should be set back on a line with other buildings on the same side of the street, was held to be prospective and ambulatory in its operation and application, and that the intention was that whenever a building line was created by the erection of buildings on neighboring lots on that side of the street, the grantee and his successors would accommodate themselves to that line. *Camovito v. Matthews*, ... N. J. Eq. ..., 88 Atl. 187 (1913).

In this respect the court said: "At the time the covenant was made there were but two or three buildings on the east side of Clifton avenue. These set back from the street line approximately thirteen feet. Former owners erected buildings on the lands of the complainant and defendant in about the same range, which are now used as stores with dwellings overhead. Trade has pushed its way up along Clifton avenue, so that at the present time the locality of defendant's property is more commercial than residential, and nearly all of the

buildings devoted to business are built out to the street line. In keeping with them the defendant is building and extending her store to the street line of Clifton avenue. The complainant, who evidently is not inclined to keep up with the progress of the neighborhood, seeks to restrain her by an enforcement of the covenant of their predecessor in title. As I view the covenant it is prospective and ambulatory in its operation and application. Its meaning is that, wherever the building line should be created by neighboring owners, to that line the covenantor and his successor in title may accommodate themselves. No other reasonable construction, it seems to me, can be given to the covenant. The contention of the complainant that the covenant relates to the line of the two buildings then on the east side of Clifton avenue is not impressive."

§ 91. "Equidistant," and not less than certain distance from street.

A deed requiring that all buildings erected on the land should be "placed equidistant from and at the distance of not less than eight feet back from the street," is not violated by a building the front line or wall of which is nine and a half feet back from the street, except a bay window projecting therefrom, which extends to the eight foot line. *Smith v. Bradley*, 154 Mass. 227, 28 N. E. 14 (1891).

In this case the plaintiff contended that the term "equidistant" in the restriction required the defendant to put the front of his building back to the uniform line of the fronts of the adjoining houses already erected. "But it is clear," said the court, "that the line thus fixed must be a line of apparent rather than actual uniformity; and there is nothing in the case to show that the building of the defendant will, if erected as proposed, disturb this apparent uniformity of line. It will be impossible to make the front line or wall of the defendant's building exactly equidistant from the street with that of the other buildings, for these are not equidistant with each other; even the front corners of the plaintiff's own dwelling are not equidistant from the street. Moreover, it would be unreasonable, when the other buildings were intended, as the court has found, to be eight feet back from the street, and are not

somewhat more than that distance, through causes due to the imperfect manner in which they were constructed, to require the defendant to conform his building to the accidental line thus established, and which the owners of the other buildings might rectify and would have the right to rectify. It would be giving the other land owners an easement in the land of the defendant in a manner never contemplated by the original deed, and we do not think that the term 'equidistant' can be so construed. If it were necessary for us to define it, we would sooner incline to think it was used more in the sense of parallel. It would be highly probable that, under a restriction requiring the front line of buildings not less than eight feet from the street, all buildings would be set back eight feet and no more. In that case, if the word 'equidistant' is construed as meaning that all buildings shall be the same distance from the street, it would add no power to the requirement that they should be eight feet back from the street. If, however, it should be construed in the sense of parallel, then, in addition to the uniformity produced by buildings placed the same distance from the street would be the uniformity produced by their being placed in a line with the street. Again, if any other line than a line eight feet from the street is to be adopted, how is it to be fixed? We think, therefore, that the defendant has a right to build out to the eight foot line, and that there is nothing in the proposed construction of his building that will violate this restriction."

§ 92. Restriction as to L. not applicable to building without L.

A restriction provided that all buildings erected on the land conveyed should be placed equidistant from, and at the distance of not less than eight feet back from the street, and should have no L. more than two stories in height. It was held that the restriction was not violated by a building four stories high, but which had no L., the building meeting the provision as to distance from the street. *Smith v. Bradley*, 154 Mass. 227, 28 N. E. 14 (1891).

In a deed to a city lot it was stipulated that the grantors should not erect, back of their existing counting room, any

building more than one story high; the object being, as the deed recited, that the grantee was not to be incommoded in regard to light in the back part of his premises by any high building. There was a one-story building back of the counting room, and an action was brought to restrain the increasing of its height. Held, that the restriction was merely intended to prevent the raising of the building to the height of two stories, and not to forever confine the structure to the precise height it then was. *Hobson v. Cartwright*, 93 Ky. 368, 20 S. W. 281 (1892).

In relation to the construction of such a provision, the court said: "It should never be assumed, in absence of plain and unambiguous words to such effect, that parties contract in relation to sale or exchange of real property with sole regard to its present condition and without at all contemplating or providing for future changes and improvement that may take place in or around it."

§ 93. "Outbuildings."

The word "outbuilding," or "outhouse," has been defined as "a building adjoining or belonging to a dwelling house." It is something which is to be used in connection with a main building, and its subserviency to the mansion house gives it the denomination of an outhouse. *Firth v. Marovich*, 160 Cal. 257, 116 Pac. 729 (1911). Consequently, if there is no main building the erection of a stable, for instance, could not be justified under permission to erect necessary outbuildings.

A restriction in a deed to land provided that "no buildings shall be erected other than dwellings, with necessary outbuildings. The defendants placed on the premises a tent containing a stove and furniture, and lived in it in the day time during the summer months. They also moved a barn onto the premises, and intended to use it as a stable in connection with a tent and with a dwelling house, if one should ever be built, but they had no definite intention of building a dwelling house at the time in question. The tent was held to be forbidden by the restriction, and that, as there was no proper main building, the stable was not an outbuilding within the meaning of the restriction, and that the grantor was entitled

to a decree directing the removal of both tent and stable. *Blakemore v. Stanley*, 159 Mass. 6, 33 N. E. 689 (1893).

A restriction in a deed provided against the erection of any building on the premises except a dwelling to cost not less than fifteen hundred dollars, and that it should be placed back at least twenty feet from the street line; which permitted the customary outbuildings, but prohibited the erection of any barn, shed, or other building closer than ninety feet to the street line. The owner erected a residence thereon built of rough boards, battened, at a cost of only eight hundred dollars, and located the same more than ninety feet from the street line. Held, that such building was not an "out-house" within the meaning of such restrictive covenant. It was not an adjunct to any main building, and it was built for no other purpose and put to no other use than that of a dwelling. Viewed as a residence, it did not meet the requirements of the deed as to cost and value. Relative to this question the court said: "We are not called upon to decide whether it would be a violation of the conditions in this deed for this grantee to erect a stable or other building before constructing his residence, and to live in such outbuilding pending the construction of a residence. That question is not presented here. There is nothing to indicate that the structure complained of was designed or adapted for anything but a dwelling, or for any use to which an outbuilding could be put, or that the erection of a further residence was at any time contemplated." *Firth v. Marovich*, 160 Cal. 257, 112 Pac. 729 (1911).

§ 94. — garage.

A restriction forbidding the placing of buildings on the land conveyed other than a dwelling and the usual outbuildings appurtenant thereto, has been held not to permit the erection thereon of a garage for private use. *American Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N. E. 114, 12 L. R. A. (N. S.) 730 (1911).

This decision was reached on the theory that such restrictions must be interpreted in the light of the circumstances existing at the time they were imposed, and that the word

“outbuildings” includes only such buildings as were fairly indicated by the word at that time. “The question,” said the court, “is whether the building is of the kind which was usually appurtenant to dwelling houses at the time the restriction was imposed. If it is not, then its erection was in violation of the restriction. It is to be borne in mind that we are dealing with a proposed residential district of a high grade, and that this district is not in a country town, but in a city,—a district to be divided into building lots and to be covered substantially with dwelling houses. Whatever buildings were usually needed and occupied as aid to the use of the dwelling houses might be erected and occupied as such aids. The automobile is a large machine, and it is noisy, especially when starting. The odor of gasoline, by which many of them are propelled, is penetrating and disagreeable; and there can be no doubt that the noises and odors attendant upon the care and action of such machines, especially when stored so near to dwelling houses as in this case, may be annoying to a person desiring a quiet home. At the time these restrictions were put on, the garage was not the kind of building usually appurtenant to a dwelling house. Its erection was a violation of the restriction.”

CHAPTER V.

RESTRICTIONS RELATING TO DWELLINGS, RESIDENCES, HOUSES, FLATS, TENEMENTS AND APARTMENTS.

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§ 95. Dwelling defined.

The word “dwelling” is one of multiple meanings; but the particular meaning intended to be expressed by it when used in a given instance, may be rendered by the context or attendant circumstances; and usually resort must be had to those aids to interpretation to ascertain what is meant. In its broadest significance the word denotes a building used as a settled human abode; and, in common parlance, when not qualified, conveys the notion of a home; though a suite of rooms occupied by one man may be his dwelling house.

Sanders v. Dixon, 114 Mo. App. 229, 247, 89 S. W. 577 1906.

In the sense in which the term is ordinarily understood and used, a dwelling house is a house occupied as a residence, in distinction from a store, office, or other building. *Johnson v. Jones*, ... Pa. ..., 90 Atl. 649 (1914).

In any proper sense, there is always one controlling idea in the use of the words "dwelling house," and that is that it is a house intended for human habitation.

An owner of land conveyed a portion thereof and in the deed provided that "no dwelling house shall be erected upon the premises." Thereafter the grantee erected a structure thereon, on the first floor of which was a garage and boiler house, and on the second floor bedrooms and bathroom, occupied by the servants of a lessee. Held that the structure was a violation of the covenant, and that its use for dwelling purposes should be enjoined. *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611 (1912).

In this respect the court said: "It is undisputed in this case that what the defendant erected upon the restricted premises was a house, one part of which was a garage and boiler house, and the other part of which was a dwelling house. The four walls and roof of any structure properly called a 'house' undoubtedly constitute what it is proper to define as a 'house.' The interior arrangement within the four walls and under the roof determines whether the same is a 'dwelling house' or what kind of a 'house' it is. In the case at bar, the defendant Ely erected a house, and by its interior arrangement constituted part of that house not a dwelling house, and constituted part of it a dwelling house. The restriction is that 'no dwelling house shall be erected on the premises.' To the extent, therefore, that he erected a house to be dwelt in, he violated the covenant, and to that extent the complainant is entitled to relief. I need not cite authorities for the principle that apartment or flat houses are dwelling houses; and, perhaps, it will aid to illustrate my meaning if I should suggest that a covenant in this language would be clearly violated if a man should erect a house, the first and second floors of which were fitted up for stores or offices, and the floors above the second were fitted up for flats. The four walls and the

roof, as above suggested, would constitute the house, and that part of it which was fitted up for dwelling purposes at the time of the erection of the house would constitute the erection of a house to be dwelt in, or, in other words, a dwelling house."

A "dwelling house" has been held to mean, a house constructed for the dwelling of a single family; *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726 (1913); and that it is equivalent to "dwelling," and means the home of one family. *Bolin v. Tyrol Investment Co.*, ... Mo. App. ..., 160 S. W. 588 (1913).

A deed contained the following provision: "Under and subject, nevertheless, to the condition and restriction that no building, or part of a building, shall ever be built or erected on the rear end of the said above described and hereby granted lot of ground that shall be used or occupied as a dwelling house, and that no building, or part of a building, except steps, cellar doors, posts and railings, shall be built within the space of ten feet back from the line of the north side of the said thirty-four feet wide street." The church (owner) commenced the erection of an addition to the parish building, such addition containing living rooms, kitchens, bedrooms and studies for the clergy of the parish, and was intended to be used as their residence. Held, that such addition was not a dwelling house within the meaning of the restriction. *Crofton v. St. Clement's Church*, 208 Pa. St. 209, 57 Atl. 570 (1904). In regard to this question the court said: "The building, as a whole, is for church or ecclesiastical purposes, and only a portion of it—the extension—is to be a residence for the clergy. The general character of the whole building is far from being a dwelling house, and, recurring again to the words of the restriction, to be read with every doubt resolved in favor of the appellees' right to the fullest use and enjoyment of their property, they ought to be read as referring to a building used or occupied as a whole as a dwelling house."

Restrictions providing that only a dwelling should be erected on the land conveyed to cost not less than fifteen hundred dollars, to be placed not less than twenty feet from the street line, allowing the customary out-buildings, and providing that no barn, shed, or other building should be

erected closer than ninety feet to the street line, is violated by the erection of a residence built of rough boards, battened, and costing only eight hundred dollars, although placed more than ninety feet from the street line. *Firth v. Marovich*, 160 Cal. 257, 116 Pac. 729 (1911).

In this respect the court said: "The respondents point, however, to this clause, 'and it is further agreed that no barn or shed or other buildings shall be built or located closer than ninety feet to the front or street line of the building,' and argue that it permits the erection, at a distance of ninety feet or more from the street line, of any building, whatever its cost, and for whatever use. This is an entirely inadmissible construction of the language. In view of the earlier provisions that no building, except a residence with out-buildings, should be erected on the premises, or any part thereof, the words 'or other building' plainly have reference to the out-buildings permitted at the outset of the paragraph. This meaning is rendered more evident by the fact that this phrase is used in connection with and following the words 'barn or shed.' The effect of this final provision, reading it as a part of the entire restrictive clause, is to require out-buildings to be set back ninety feet from the street line, while the main residence may be built at a distance of only twenty feet from the street."

The fact that at the time a restriction was imposed on lands confining their use to dwelling purposes, it was not so occupied is of no importance, because such a covenant looks to the future. *Simons v. Mutual Construction Co.*, 132 N. Y. App. Div. 719, 117 N. Y. Supp. 567 (1909).

§ 96. Covenant to erect dwelling refers to first building erected.—Does not exclude other buildings.

A covenant provided, that the grantee should erect a substantial two-story dwelling house to cost not less than two thousand five hundred dollars; that no building should be erected within twenty feet of the street; that certain businesses and trades should not be carried on on the premises, and that buildings for specified uses should not be erected thereon. Held, that such covenant could not be construed as

prohibiting the maintenance of any building other than a dwelling house on the land, as the restriction related to the first building erected. *Hurley v. Brown*, 44 N. Y. App. Div. 480, 60 N. Y. Supp. 846 (1899).

In this respect the court said: "The grantor was the owner of a large tract of land, which it was endeavoring to market in suburban lots. The erection of buildings and improvements on the property it might sell would enhance the value of the rest, and render it more marketable. For this reason it required its grantees to agree to improve the property by the erection of a two-story dwelling house costing not less than twenty-five hundred dollars. But there could have been no intention to restrict the height of the houses; on the contrary, the higher the buildings, and the more expensive they might be, the greater would be the advantage to adjacent property. Still, even this covenant, if literally construed, would not limit the use of the property, nor the subsequent erection of buildings of a different character. If the grantee erected a two-story dwelling house, he would perform his covenant, and thereafter might alter the structure, erect a new building, or use it for any purpose not forbidden by the other provisions of his agreement. . . . If, as contended by the appellant, all that was meant by this provision was that nothing but a dwelling house to cost not less than twenty-five hundred dollars should be at any time erected on the premises, it was very easy to have said so. It is provided that no blacksmith or carpenter shop or manufactory of any kind, etc., shall be erected or permitted on the land. If it was intended that no shop or store of any character should be allowed, why was it not so written? The very fact that certain business uses are expressly forbidden indicates that other business uses of a different character are permitted. To interpret this covenant as forbidding the use of the property for any business purposes would be an unwarrantable extension of its terms."

§ 97. Covenant as to maintenance of dwellings on lot applies to existing building.

The conveyance of a lot of ground with a residence by deed containing a provision that "no building other than one single

dwelling house shall be maintained on said lot," applies to the existing building as well as to those erected in the future. *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768 (1897). The court said: "The defendants contend in the first place, that the restriction was not intended to apply to the house already on the lot, but only to houses which might be built in the future. If this were so, the plaintiffs would be without remedy if the house were to be considerably changed in its interior construction, and converted into a hotel for transient guests, a public eating house, a liquor shop, or a factory. We should be slow to give this construction to the deed."

§ 98. Dwelling.—Double house.

A property restriction limiting the use thereof to dwellings costing not less than twenty-five hundred dollars, to be erected not less than fifteen feet from the street line, was held not to be violated by the erection of a double house, several other houses of the kind having been erected on the same plat without objection. *James v. Irvine*, 141 Mich. 376, 104 N. W. 631, 12 Det. Leg. N. 454 (1905).

The court said: "Double houses have been built upon the same subdivision without objection, and complainant testified that he did not deem such buildings objectionable. There were such houses on the street when he bought. Is a house more objectionable because built to accommodate two families on the same floor than when one is on the floor above? Complainant also testified that defendants' house is not objectionable in appearance, and there are other houses upon the subdivision more objectionable than theirs. One of the original owners, complainant's witness, testified that a house designed for two families was not detrimental to the street. Another witness for complainant testified that the five double dwellings then on the street are not detrimental to it. The defendants submitted their plans to the complainant, and he stated that the building would look as good as two-thirds of those on the street."

§ 99. Dwelling.—Private garage.

The owner of premises subject to a restriction providing that they should be used for residential purposes only and

emphasizes the destruction of individuality by multiplication that creates community, marks the line between privacy and publicity and makes conspicuous the fallacy of the reason suggested."

§ 102. Private dwelling.—Boarding house.

A lease provided that the demised premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose," and contained a renewal clause. It was held that the fact that the lessee allowed the premises to be used as a boarding house, constituted a defense to an action for specific performance to enforce a renewal of the lease, although the lessor had consented to the use of the premises as sleeping rooms in connection with a girls' school. *Gannett v. Albee*, 103 Mass. 372 (1869).

In this respect the court said: "The consent of the lessor that the plaintiff might occupy and use the house, in connection with his school for young ladies, cannot fairly be construed as a general or absolute waiver of the limitations as to the nature of the occupation. It is not the case of a condition which, when once dispensed with, is discharged for all purposes, and cannot be revived, but of a covenant which can be modified by consent. The lessor might be willing to consider such a use of the house as not an entire departure from its intended character of a private dwelling, and not an appropriation to a public or objectionable purpose. But its conversion into a public boarding house is an entirely different matter. In making the original lease with its restrictions, the lessor may have supposed that such a use would subject the house to a greater wear and tear, or to greater depreciation in value, or require more frequent repairs, or increase the rate of insurance. All these considerations may have had their influence upon her mind as to the rate of the rent and the length of the term. The use of the house as a boarding house is a violation of the terms of the lease, and would subject it to very different conditions."

§ 103. Private dwelling house.—Railway embankment.

A railroad took for the purpose of their business land which was subject to a covenant entered into by their grantor not to

erect thereon "any building other than a private dwelling house." It was held that the erection of a railway embankment on the land constituted a violation of the covenant. *Long Eaton Recreation Grounds Co. v. Midland R. Co.*, (1902) 2 K. B. 574.

§ 104. Private dwelling house only.—School for music and dancing.

A lease contained a covenant against the use of the demised premises by the lessee or his assigns for a shop or public house or for the carrying on of any public trade or business whatsoever without the consent in writing of the lessor, and also that the premises should be occupied and used as a private dwelling house only. Held, that the use of the house as a day school for music and dancing, and advertising such fact by a brass plate on the outer gate containing the words "Ladies' School," and the circulation of a placard to that effect, constituted a breach of the covenant. *Wickenden v. Webster*, 6 El. & Bl. 387, 2 Jur. 590, 25 L. J. Q. B. 264, 4 Wkly. Rep. 562 (1856).

In this respect the court said: "No distinction appears to be maintainable between a day school and a boarding school, however extensive. It is a school in either case; and there can be no doubt that the under lessee took as many eligible pupils as he could get. There was also exhibited a public placard, announcing that there would be a select class, not merely private instructions. It seems to me that it was intended, by this advertisement, to carry on the concern on a somewhat extensive scale. That was very different from using the premises as a private dwelling house only."

§ 105. Private dwelling house only.—Taking orders for coal, etc.

The lessee of a dwelling house covenanted to use the premises for a private dwelling house only. Thereafter he displayed in a window of the house a sign containing the words "A. B. Coal Office," and received orders for coal there. No coal was supplied from the house, nor any samples exposed to view, but the inhabitants of the neighborhood came to the

office if they chose to order coal. Held, that such use was a breach of the covenant. *Wilkinson v. Rogers*, 10 Jur. (N. S.) 5 (1864).

§ 106. Private dwelling only.—Not to be sublet.—Lessee leaving caretaker in charge.

A covenant in a lease provided that the demised apartment should be used as a private dwelling only and should not be sublet without the consent of the lessor. Held, not to be violated by the lessee placing one in charge of his apartment as servant or caretaker to look after it during his absence, against the consent of the landlord. *Presby v. Benjamin*, 169 N. Y. 377, 62 N. E. 430 (1902).

§ 107. Dwelling house.—Tenement.

In *Campbell v. Bainbridge*, (1911) 2 Sc. L. T. 373, it was held that a tenement is simply a dwelling house with more or less accommodation in it. In that case the restrictive covenant involved prohibited houses or buildings other than "villas or dwelling houses with offices and such enclosing walls as my said disponent may think proper to build." It was proposed to erect on the land what is generally known as a tenement house, that is to say, a structure in which there are separate sets of rooms forming separate dwelling places for families. It was contended on behalf of the grantee that the expression "villas or dwelling houses" must be read along with the context; that the word "villas" followed by the words "dwelling houses" really was equivalent to "villas and dwelling houses like villas," or "villas and dwelling houses of that class," and that the words must be read with reference to the objects of the deed in which they were found.

In construing the covenant in question the lord president said: "I ask myself whether the words 'or dwelling houses' can be considered as merely exegetical of 'villas.' I see no reason for supposing that they are, and the disjunctive 'or' is certainly quite as appropriate to the view that they are not. I agree that, if there was never a case in which you could suppose that a tenement of houses should have offices attached, there would be something to be said for the idea that, in as

much as these things which are to be built are to have offices attached or there is a possibility of them having offices attached, this would make 'dwelling houses' merely exegetical of 'villas,' if a villa was the only thing which could have offices attached. But it seems to me that a tenement is just as much in need of offices as a villa is. There was a necessity for putting the word in because, if nothing had been said, it might have been said that you could not build adjuncts, such as coal houses, wash houses, and so on, on the back ground. It seems to me, therefore, that the prohibition is a prohibition against all things that do not fall within the class allied with villa or dwelling house, that is to say, shop or manufactory, and so on. But a tenement of dwelling houses is just a dwelling house. It is a dwelling house with more or less accommodation in it. I cannot think that, in ordinary parlance, a set of flats could not be called a dwelling house—they are dwelling houses, and it is noticeable here that the plural is used and not the singular."

§ 108. Dwelling houses.—Flat or tenement.

The erection of a flat or tenement house does not constitute a violation of a covenant providing that only dwelling houses shall be built upon the premises. *Roth v. Jung*, 79 N. Y. App. Div. 1, 79 N. Y. Supp. 823 (1903). See, also, *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808 (1913), in which the restriction was to *one* dwelling house, and was held to preclude the building of a flat or tenement.

§ 109. Dwelling house.—Alteration of for business purposes.

A restriction against the erection of any building on the premises conveyed other than a dwelling house, is violated by the alteration of a dwelling house thereon by putting on a store front so as to allow the first floor to be used as a tailoring establishment and the upper stories for apartments. "The alteration of a private dwelling house into a business building would violate the covenant as plainly as the erection of a business building in the first instance would violate it. The putting in of the store front radically changes the character

of the building and deprives it of the character of a private dwelling house." *Pagenstecher v. Carlson*, 146 N. Y. App. Div. 738, 131 N. Y. Supp. 413 (1911).

§ 110. Dwelling house.—Grocery.

A deed to land provided that no building should be erected thereon except a dwelling house, and that said building, when erected, should not be occupied for the purpose of carrying on any offensive trade or calling whatever. It was held that it amounted to a violation of the restrictions for the grantee to build a dwelling house on the land and then use the lower story as a grocery. *Dorr v. Harrahan*, 101 Mass. 531, 3 Am. Rep. 398 (1869).

"The defendant insists," said the court, "that such conditions and restrictions in a deed are not to be favored, and that they are not to be extended, by implication, beyond the most bare and literal interpretation of the terms in which they are expressed. He admits that, by the deed, he can build nothing but a dwelling house; but he also insists that he is at liberty to change this dwelling house, when built, into a place of business. The deed provides, that the 'buildings, when erected, are not to be occupied for the purpose of carrying on any offensive trade or calling whatever;' and he claims that, under a literal construction of this expression, he may establish a grocery in his dwelling house, provided it is conducted, as it may be, in an inoffensive manner. But this mode of dealing with the condition deprives it of all force whatever, and seems to us to be a mere evasion. There is nothing in the condition that appears to be unreasonable, or contrary to the policy of the law; and there is no reason for doing violence to the language in which it is expressed, or perverting its true meaning. Some kinds of industry might be carried on in a dwelling house without any inconvenience whatever to the neighborhood. The house might be occupied by a physician or a lawyer, perhaps by a chemist or photographer, and a portion of it set apart as an office or place of business without any offense or objection. All this would be allowable under the deed. But to change a dwelling house into a grocery, a workshop, or a market, would be a very different

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matter. . . . Even if the bald and literal construction contended for by the defendant could be sustained, it is by no means certain that under his answer it would be of any avail to him. He admits that in building his house he had it in view to finish a part of it for use as a grocery."

§ 110½. Dwelling house.—Theater.

A restriction prohibiting the erection on the land conveyed, facing specified streets, of any building other than "dwelling houses," was held to be violated by the erection of a theater building occupying the entire width of the lot and facing on one of the designated streets. *Chambers v. Foley*, ... Pa. St. ..., 91 Atl. 350 (1914).

§ 111. Dwelling house.—Photograph gallery.

A restriction against the erection of anything but a dwelling house on the granted premises is violated by the erection of a photograph gallery. *Frink v. Hughes*, 133 Mich. 63, 94 N. W. 601, 10 Det. Leg. N. 106 (1903).

§ 112. A dwelling house.—Double house.

A restriction prohibiting the erection of any building other than "a dwelling house" with the usual appurtenances, and also providing that no dwelling house should be erected at a cost of less than five thousand dollars, and should not be less than two and one-half stories high, was held to forbid the erection of a double house with one entrance. *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726 (1913).

In this case the court said: "The remaining question to be considered is whether a proper construction of the restrictions in the deed prohibit the erection of double houses. Brill himself testified: 'I figure putting up a nice double house with one entrance.' If we regard the strict definition of the term he uses, he figures on building two houses in a set together—a pair—a house multiplied by two, composed of two equivalent or corresponding parts, containing the same portion of measure as to size, strength, etc., repeated. The fact that the proposed double house is to have one entrance, or be so designed externally as to resemble a single dwelling house, or more

the occupants thereof, shall ever be erected upon any part of the said land; that none of the structures so erected shall ever be used for any other purpose than a dwelling house, or its necessary out-buildings, or church." The purpose of the restrictions was to permit the erection of only such buildings "as shall harmonize and tend to beautify the general neighborhood and tend to advance values." Held, that this covenant would not be violated by the erection upon the land of a series of buildings, each of the series to be four stories high, each story to contain two separate apartments, each flat or apartment being designed and improved suitable only for use separately for housekeeping apartments; each apartment to contain a reception hall, a large living room, and two bedrooms, a dining room, a servants' room, in addition to the bathroom, pantry and kitchen; but nowhere in either of the buildings was there intended to be any central room for use as a restaurant, nor were the buildings intended to be adaptable for use for other than dwelling purposes. *Johnson v. Jones*, ... Pa. ..., 90 Atl. 649 (1914).

In a suit brought to compel specific performance of a contract for the sale of real property in the City of New York, it appeared that the defendant refused to carry out the contract on the ground that there was a restriction on the property which would prevent the construction and maintenance thereon of an apartment house, and that such restriction rendered the title unmarketable. The contract of sale provided that the premises should be conveyed subject to the restrictive covenants on record affecting them, if such covenants did not prohibit the erection and maintenance of an apartment house on the premises, and that the title would not be rendered unmarketable by reason of the maintenance of such house thereon. The covenant in question was known as the Murray Hill Restriction, and provided that the parties thereto would not erect or cause to be erected on the land affected "any building or erection other than brick or stone dwelling houses of at least two stories in height and with the ordinary yard appurtenances to dwelling houses and except churches and stables of brick or stone for private dwellings." Held, that the restriction did not forbid the erection and main-

tenance on the land of an apartment house, and judgment was rendered directing specific performance of the contract. *Reformed Protestant Dutch Church v. Madison Avenue Bldg. Co.*, 163 N. Y. App. Div. 359, 148 N. Y. Supp. 519 (1914).

In the construction of this covenant the court said: "It is urged that the use of the words 'private dwellings' in limiting the character of the stables which might be erected indicates that the parties intended only private residences should be constructed upon the tract. But I do not think the reference to private dwellings in describing the character of the stables which might be erected can be construed as limiting or restricting the character of the dwelling houses previously mentioned. The parties intended to permit the erection of stables only for the private use of the dwellers upon the property as distinguished from livery or boarding stables. In providing that only stables for private dwellings should be erected, therefore, the parties to the agreement did not necessarily mean that only private dwelling houses—that is, dwelling houses designed for single families respectively—might be erected; on the contrary, it may well be claimed that the reference to private dwellings, in connection with the stables, while the houses themselves were described only as dwelling houses, shows that the parties knew and intended to make a distinction between dwelling houses and private dwellings. There certainly is as much merit in the one argument as the other, and I do not think the description of the stables which might be erected was intended to or should be considered at all in determining the character of the dwelling houses which might be erected." Speaking further, and specifically in relation to the intention of the parties to the covenant with regard to the character of the use intended to be made of the land, the court said: "They undoubtedly did intend it to continue as a residential district, but they limited the character of the buildings only to 'dwelling houses.' Apartment houses, a form of building unknown until long after the agreement was made, are now the dwelling houses of a constantly increasing proportion of the residents of the City of New York. Whether the parties, if they could have foreseen this development, would have provided against it, is purely a matter of

speculation. They did provide, however, only against the erection of any buildings other than dwelling houses, and an apartment house of the kind described in the submission certainly does not come within this prohibition."

§ 114. Detached dwelling house.—Apartment house.

Land was conveyed to be used "only as a site for a detached brick or stone dwelling house, to cost at least two thousand dollars, to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lot." Held, that an apartment house constructed for the use of six families in separate apartments, constituted a violation of such covenant in that it was not a "detached dwelling house." *Pearson v. Adams*, 27 Ont. L. Rep. 87, 3 Ont. Wkly. N. 1660, 7 D. L. R. 139 (1912).

§ 115. Dwelling house for private family.—Use for boarders and lodgers.

A restriction providing that no building shall be erected on the premises except a "dwelling house to be used exclusively as a residence for a private family," together with the necessary out-buildings, is violated by the letting of rooms in the dwelling on the premises to boarders and lodgers averaging in number about twelve at a time and staying for periods of about two weeks. *Sayles v. Hall*, 210 Mass. 281, 96 N. E. 712 (1911).

§ 116. One dwelling house for private residence only.—Flats.

A plot of land was sold subject to a restrictive covenant on the part of the grantee to erect thereon not more than one messuage or dwelling house to be used as a private residence only, and that no trade or business should be carried on thereon. It was held that the erection of a large block of residential flats was a breach of the covenant, even if the number of the houses was unrestricted. *Rogers v. Hosegood* (1900), 2 Ch. 388, 83 L. T. Rep. 186, 16 T. L. Rep. 489, 69 L. J. Ch. 652, 48 Wkly. Rep. 659.

In this case it was said by Collins, L. J., speaking for the

court: "Though the proposed building is certainly not one messuage or dwelling house only adapted for and used as a private residence, neither does it seem to us to constitute several separate dwelling houses 'adapted for and used as private residences only,' within the meaning of the covenant. We think residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal or technical sense; and we do not think that residential flats, though for many purposes separate dwelling houses, come within the popular description of the class of buildings which it was intended to permit."

§ 117. Not more than one dwelling house.—Stable.

A restrictive covenant provided that not more than one dwelling house shall be erected on said lot, and that no apartment house nor flats of any description shall be erected on the same, and that such building shall not cost less than thirty-five hundred dollars to build, and shall not be used for manufacturing, mechanical, or business purposes of any kind whatsoever, but solely for dwelling purposes. Held, that the erection on such lot of a stable for use in a drayage, express, and plumbing business, constituted a violation thereof. *McNeil v. Gary*, 40 App. D. C. 397, 46 L. R. A. (N. S.) 1113 (1913).

In this respect the court said: "In the first place, the provision that not more than one dwelling house shall be erected on a lot was intended to exclude the erection of other structures. This is made manifest by the second clause of the first covenant that no apartment nor flats shall be erected. The parties evidently feared that an apartment house or flat might be regarded as a dwelling house within the meaning of the preceding clause, and hence expressly excepted it from said clause. The first restriction in the second covenant, that no such building—that is, that no such dwelling house—shall cost less than thirty-five hundred dollars, emphasizes what was apparently in the minds of the parties, that this sub-division should be devoted to a good class of dwellings. The next clause prevents, in terms, the use of any dwelling house for

manufacturing, mechanical or business purposes of any kind. It seems to us that no one purchasing one of these lots and accepting a deed containing these covenants could reasonably fail to understand that he could not do in one way what he was forbidden to do in another; in other words, that the provision that not more than one dwelling house should be erected on a lot, coupled with the provisions that it should cost not less than thirty-five hundred dollars, and not be used for any other purpose, meant that this sub-division should be devoted to dwellings, and not business, purposes. The result, and not the manner of achieving it, is material. Unless these covenants are to be given this construction, they become a mere jumble of words and their obvious intent is frustrated."

§ 118. One dwelling house.—Flats or tenement.

A tract of land was sub-divided and lots therein conveyed subject to restrictions prohibiting the construction of more than one dwelling house on each fifty foot lot. Held, that a flat building, designed to accommodate a number of families under one roof in separate apartments, was violative of such restrictions, the purpose being to insure the residential character of the neighborhood. *Bolin v. Tyrol Investment Co.*, ... Mo. App. ..., 160 S. W. 588 (1913). "The prevailing idea to be gathered from these restrictive covenants," said the court, "is that when a dwelling is to be built it is to be a single dwelling—a single dwelling house, not 'one house.' In the case before us the words are 'any dwelling house'; 'one such dwelling'; 'a dwelling'; 'such dwelling.' Always in the singular."

A restriction providing that only one dwelling house should be built on the lot conveyed precluded the building of a tenement or flat building containing several apartments. *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808 (1913).

A restriction on the use of land to "one dwelling house" restricts the use of the premises to one dwelling and not merely to one house having therein a number of dwellings. *Harris v. Roraback*, 137 Mich. 292, 100 N. W. 391, 11 Det. Leg. N. 251, 109 Am. St. Rep. 681 (1904).

"In ascertaining the intention of the parties to the deed

containing this restriction," said the court, "we obtain, in our judgment, little aid by discussing defendants' contention, with which we do not agree, that 'one' refers to 'house,' and not to 'dwelling.' We obtain infinitely more aid by looking at the sentence as a whole, and thus determining its obvious meaning. When the parties agreed not to occupy said premises, 'except for one dwelling house,' they obviously intended to agree, and they did therefore agree, that no building should be thereon erected which could not be described as one dwelling house. In the sense in which words are ordinarily used—and we must presume these words to be used in that sense—a building planned and designed for two or more dwellings cannot properly be described as one dwelling house. I think we are bound to hold that by the language in question the parties to this deed intended that no house except one planned and designed for a single dwelling should be erected. . . . The question here is not how a building planned and designed as a residence of a single family shall be subsequently used, but it is whether a building designed and planned for two separate residences is properly described as one dwelling house."

A covenant against the erection of "more than one dwelling house" on a lot, is violated by the erection of a double two story flat building intended for the use of four families. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

§ 119. One building for dwelling house purposes.—Double house.

The erection of a double house on a lot constitutes a violation of a restriction forbidding more than one building to be erected on the lot for dwelling house purposes. *Brigham v. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185 (1908). Such a structure is as much two buildings for dwelling house purposes as though separate roofs existed. The two parts of the building may even pass to separate owners, and the dividing wall become a party wall.

§ 120. "Single" dwelling house.—Flat or apartment.

Two adjoining lots, each having a frontage of fifty feet, were conveyed by deed containing the following restriction:

"It is understood and agreed, as a part of the consideration expressed above, that only a single dwelling house is to be constructed or placed upon each fifty-foot lot, and that no building shall be placed upon the east thirty feet of said premises." It was held that the word "single" referred to the structure and not to the use that should be made of the building, and meant that only one dwelling house should be erected on each fifty-foot lot. It was therefore held in this case that the grantee might erect a flat or apartment building upon each lot, four stories high, with a partition wall separating the two buildings and extending on the line between the two lots, and could use the same for residences for more than one family. *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391 (1893).

The reasoning of the court in this case was as follows: "The intention of the parties must be determined from the language of the deed itself, considered in connection with the surrounding circumstances at the time the deed was executed. Only a single dwelling is to be constructed or placed upon each fifty-foot lot. Does the word 'single' apply to the building or the use which should be made of the building when constructed? The question is one which is not entirely free from doubt, but we are inclined to the opinion that the word 'single' signifies one building. This seems more reasonable from the fact that Hutchinson, the grantor, in making other deeds for a part of the lots in the same subdivision used the word 'one' as synonymous with the word 'single.' . . . We think the parties intended by the use of the words in the deed the same as if they had said in the deed 'only one dwelling house should be erected on each fifty-foot lot.' No doubt the grantor had in mind, and desired to prohibit, the erection of several small dwellings on each fifty-foot lot; the intention being to require the erection of large structures on the property. It was also no doubt the intention of the grantor to require the property to be used as residence purposes. Under the clause in the deed, stores, livery stables, warehouses, houses for manufacturing purposes, could not be erected; nothing but dwelling houses. At the time this deed was executed, flats or apartment houses where several fam-

ilies could reside were common in Chicago. Such buildings had been erected and were then in use, within a short distance of these lots. If, therefore, it was the intention to prohibit the erection of a flat on the property, why did not the parties say so in the deed? Or if they intended that only a building such as is usually built for a private residence of a family should be erected, why not say that in the deed? There can be no doubt in regard to the fact that the parties knew the difference between a flat and an ordinary dwelling house erected as a private residence, and it is unreasonable to believe that the language incorporated in the deed would have been used if the intention was to prohibit the erection of a flat." The court distinguishes this case from that of *Gillis v. Bailey*, 21 N. H. 149 (1850), which, the court stated, contained recitation which tended to show the intention of the parties.

The reasons given by the court for its erroneous conclusion in this case are set out here in the hope that they may assist others in arriving at a correct conclusion. This case has been criticised, and justly so, as it defeats what was evidently the intention of the parties to the agreement. It is thought that the language of the court as here given so fully shows the erroneous nature of the decision that further comment is unnecessary.

§ 121. One single dwelling house.—Flat or apartment.

A deed recited that the grantor (a corporation) was induced to dispose of its lands in large parcels and at prices below the true value, in order that the buildings erected thereon might not be crowded together, but might be each surrounded by a space of open ground, and that for this purpose it had been agreed between the parties that only one single dwelling house, or store, with outbuildings requisite for the use of the same, should be erected or placed upon the lot.

The grantee erected a building two stories high, upon the lot, finished to accommodate three tenants. It was occupied by three families in severalty, but there were doors in each story, connecting the several parts, so that a person could pass

through them to all parts of the building. After the building was fully occupied, he made an addition to it, connected throughout in a similar manner. This addition was also adapted in the same manner to the occupation of three families, and was so occupied. There was but one partition in the cellar under the whole building. Held, that the building constituted a breach of the restriction. *Gillis v. Bailey*, 17 N. H. 18 (1845), 21 N. H. 149 (1850).

"We are clearly of the opinion," said the court, "that the building erected by the defendant, and the addition afterwards made to it by him, were in violation of the condition in the deed, under which the defendant held his title, and by which, therefore, he was bound. The original building contained substantially three separate tenements, and the addition to it contained three more. It seems clear that the whole was expressly designed for the occupation of six families, and that the expedient of constructing doors, so that there could be a communication from one tenement to another, through all parts of the building, was an unmistakable attempt to evade the force and effect of the condition by a mere subterfuge. The building is substantially a block of six houses."

§ 122. One dwelling house for single family.—Converting existing house into a tenement.

The owner of a tract of land sub-divided, improved and restricted the use of the same as to the erection, use and position of buildings erected thereon. On one of the lots was an old two-family house, and he conveyed that lot together with the one adjoining subject to a restriction that, "on neither lot shall there be built or maintained more than one dwelling house, nor a dwelling house costing less than (except that the present house now standing may be maintained there as the sole house on its lot), nor shall such building be constructed or maintained other than for a single family or as a double, otherwise called a semi-detached house." It was held that the alteration of the old house on the premises into a three story tenement house, would constitute a violation of such restriction regardless of the extent to which the

old building entered into its construction, as the restriction prohibited the construction and maintenance of such a house. *Allen v. Barrett*, 213 Mass. 36, 99 N. E. 575 (1912).

§ 123. Two-story dwelling house.—Double dwelling.

A covenant restricting the erection on the premises of anything but "a two story dwelling house," has been held to be violated by the erection of a two story double dwelling house to be occupied by two families. *Bagnall v. Young*, 151 Mich. 69, 114 N. W. 674 (1908).

§ 124. First class dwelling house.—Apartment house.

The erection of a finely built six story apartment house, costing seventy-five thousand dollars and containing all modern improvements, is not in violation of a restrictive covenant limiting buildings to be placed upon such land to first class dwelling houses. *Bates v. Logeling*, 137 N. Y. App. Div. 578, 122 N. Y. Supp. 251 (1910).

So, a covenant to erect one or more first class dwelling houses is not violated by the erection of a seven story apartment house on the land in question. *Holt v. Fleischman*, 75 N. Y. App. Div. 593, 78 N. Y. Supp. 647 (1902), reversing 37 N. Y. Misc. 172, 74 N. Y. Supp. 894.

§ 125. Dwelling purposes.—Church.

A restrictive covenant in the deeds of conveyance of lots provided that none of them should "be used for purposes other than a dwelling house, office, privy, coach-house or stable, the restriction to cease only when the lot should be built on according to the spirit of the agreement." Held, that the erection of a church on one of the lots was a violation of the restriction. *St. Andrew's Church's Appeal*, 67 Pa. St. 512 (1871).

§ 126. Dwelling purposes only.—Meat and vegetable store.

A restrictive covenant that the premises in question shall be used for "dwelling purposes only," is violated by the use of a portion of a building thereon for a meat and vegetable store. *Cornish v. Wiessman*, 56 N. J. Eq. 610, 35 Atl. 408 (1896).

Referring to this restriction the court said: "The defendant's counsel opposed the relief prayed for on two grounds: First, and mainly, because, as he asserts, the building is in fact defendant's dwelling house, and the use of a portion of it as a meat and vegetable store does not violate the covenant. Counsel insists that the house continues to be a dwelling house, although a portion may be used for a store or market, and treats the case as if the question under the covenant was whether this building may still be considered as legally a dwelling house, although some portion of it is used for a store or market. Even if the question arose in this shape, I should be inclined to say that, considering the object of the restriction, the building, part of which is occupied as a store, should not be called a dwelling house only. One plain object of such a covenant is to distinguish between the use for the purpose of a dwelling house or residence and the use for purposes of trade. But the covenant in this case reaches directly to the use of the building or any part of it. It is that the premises are to be used for 'dwelling house purposes only.' As it seems to me, it is impossible to say that a 'store' or 'market' use or purpose is a dwelling house purpose. The whole of the premises (which will include the whole of any building on the premises) must, under the form of this covenant, be used only for dwelling house purposes, or barn and outbuildings; and, I think, the use of any portion of the building, for the purposes of the trade defendant carries on, is a clear violation of the covenant."

§ 127. Residence purposes only.—Stable on one lot as appurtenant to residence on another.

The owner of a tract of land subdivided the same and imposed uniform building restrictions thereon, and among other things provided that the lots conveyed should be used for residence purposes only, and that no residence costing less than three thousand dollars should be erected on any lot. Defendant purchased a lot on which he erected a dwelling house which was within the restrictions in question, but purchased an additional forty foot lot adjoining his residence lot and erected a stable thereon to be used in connection with his

residence on the other lot. The lot on which the stable was erected was subject to the same restrictions. Held, that defendant was violating the restrictions, which did not permit him to erect a stable only on the lot in question, although the same was used in connection with his residence on the adjoining lot. The court declared that the erection of a stable alone will be prohibited, although if erected in connection with a residence it might fall properly within the terms "residence purposes." *Highland Realty Co. v. Groves*, 130 Ky. 374, 113 S. W. 420 (1908).

In this respect the court said: "If the residence required by the condition of the deed had been first erected, a stable to be used in connection with it might fall within the term 'residence purposes.' But it can scarcely be maintained that a stable alone fulfills the condition of residence purposes. That which is allowed as an incident of a principal right should follow in order of time, if it is not contemporaneous, else as the grantor here could not ever compel the erection of the dwelling house, the stable alone would be upon the lot, in spite of the condition to the contrary. That such a structure, though not a legal nuisance, might be so objectionable as to offend the taste of the near neighbors and affect the values of adjoining or adjacent properties, is easy to be conceived. It was precisely such conditions that were sought to be avoided by appellant and those who had previously purchased from it." But see *Hime v. Lovegrove*, 11 Ont. L. Rep. 252 (1905), affirming 9 Ont. L. Rep. 607, discussed elsewhere in this chapter. Consult the table of cases.

§ 128. Residence purposes.—Private garage.

The erection of a small building connected with the dwelling house to be used as a private automobile garage, is not in violation of a covenant restricting the use of the property to residential purposes and prohibiting their use for "any public or private stable for horses or other animals, nor any pig sty, cow shed, hen house, slaughter house, or other nuisance of any kind, description or nature." *Beckwith v. Pirung*, 134 N. Y. App. Div. 608, 119 N. Y. Supp. 444 (1909).

In this respect the court said: "Is either the spirit and

intent or the letter of the covenant violated by the erection of a garage such as this one is intended to be? There is no allegation that it is to be of a public character. Its dimensions would hardly make that possible. If after its erection an attempt should be made to use it for such a purpose, and to thus carry on the business of storing automobiles for hire, a different question would be presented. We think that this structure is incidental to the reasonable use of property for residential purposes. If one having a fondness for flowers should attach to his residence a small extension for the purpose of a conservatory or green house, or being a lover of music, should attach a similar extension to be used as a private music room, or being a patron of art, should in like manner construct a building to be used as an art gallery, we think it could hardly be claimed that this was a violation of the covenant. However much we may differ upon a question of taste, it seems to us that if one has a fondness for automobiles, and desires to build an addition to his dwelling house for the storing of his own automobile, it cannot be claimed that he is destroying the character of the property as residential property, or devoting any portion of it to a use which is not fairly incidental thereto."

§ 129. Residence purposes only.—Unightly structure.

A restrictive covenant providing that the premises conveyed shall be used for residence purposes only and no residence of less than twenty-five hundred dollars value shall be erected thereon, was held not to be violated by a building which, when completed, would be worth twenty-five hundred dollars, and would be used for residence purposes only, although such building was unsightly and tended to render other property in the vicinity less valuable. *Maine v. Mulliken*, 176 Mich. 443, 142 N. W. 782 (1913).

§ 130. Residence purposes only.—Flats.

A restrictive covenant providing that "the property herein conveyed shall be used for residence purposes only," was held not to prohibit the erection of a flat building thereon, with a number of apartments therein, each complete for the

purposes of housekeeping, although in the basement of the building there was a large dining room to be used by the occupants of the building, if desired, as a public or semi-public restaurant. *McMurtry v. Phillips Investment Co.*, 103 Ky. 308, 45 S. W. 96, 40 L. R. A. 489 (1898).

In this case the court said: "The proof shows that the building complained of is to cost some forty thousand dollars, is to be of brick and stone and its front wall is to be set back the required distance. The controversy is whether this house is to be used for residence purposes only within the meaning of the deed. The explanation of its character and in answer to the claim that there was to be in it a public or semi-public restaurant the originator of the scheme to erect this house testified that 'there is to be no restaurant of a public nature; there is to be everything in this house to make housekeeping comfortable. Every apartment in the house is to have a parlor and dining room and one or more bed rooms and a kitchen. Every apartment is to have more than one bed room; there is only one four-room flat. Provision is made in the house for hot and cold water and all other conveniences. The basement, in which is to be a large dining room, to be used by the occupants of the house if desired, also contains three sets of laundry tubs, that each apartment may have one or more days to use in laundering their linen, or to be used in any way they choose as a laundry is used in a private residence. A part of the basement is to be used for storing the trunks of the parties who may choose to put their trunks out of their apartments. There is to be nothing about it of a cheap or nasty kind. There is but one house in St. James Court constructed of as fine material and that is the Conrad residence.' "

"It is shown, indeed admitted, that these different apartments or flats are places for persons to reside in, but it is contended that the language of the restriction conveys the idea of a single residence for a single family or at any rate excludes the idea of a number of residences under the same roof or in the same house. We think, however, that to give the language used this meaning, would be to extend its scope beyond the express intention of the parties. The purposes for

which the house is to be erected or the court was to be used were 'residence purposes only.' And as the house in controversy is to be constructed for such purpose only and is not to be used for any other purpose, we do not think that its construction is at all prohibited by this restriction clause. If the intention had been to permit the erection of only segregated private residences, the instrument would have doubtless so provided."

§ 131. Residence purposes only.—Apartment house.

The erection of an apartment house was held to violate a restriction requiring the grantee to use the land for residence purposes only. *Burton v. Stapely*, 4 Ohio N. P. (N. S.) 65, 17 Ohio Dec. 1 (1904), affirmed in 74 Ohio St. 461, 78 N. E. 1120.

§ 132. Private residence.—Two-family house.

The erection of a dwelling house designed to accommodate two families and the allowing of two families to occupy the same, is in violation of a restriction against the use of such premises for any purpose except for a private residence. *Koch v. Gorruño*, 77 N. J. Eq. 172, 75 Atl. 767 (1910).

In this case the court said: "I think it is quite clear that the defendant has violated the covenant contained in her deed.

. . . The distinction between a private dwelling house or a private residence, on the one hand, and a house built or occupied as a residence for two or more families is quite obvious. The house occupied by two or more families was called by Chancellor McGill a community house; the families living there occupy apartments separate and distinct from each other and the house becomes not a private residence as the term is used in its ordinary meaning, but a collection of apartments leased to different tenants, and if the defendant may be allowed to put two families in her house where shall she stop? She would be as well entitled to put a family in each room and then claim that her property was being occupied as a private residence. The covenant in question gives no such privilege. It must be enforced in accordance with the principles above stated."

§ 133. Private residence.—Boarding house.

A deed of conveyance provided that the property should not be used or occupied for the purpose of any trade or manufacture or for any other purpose than a private residence. The purchaser of the premises carried on a day school for girls about half a mile distant therefrom, and she proposed to use the house so purchased for a residence for herself and certain relatives, and that four of the governesses and such of the pupils as might be sent to stay with her with the object of their attending the school, should also live there. Held, that such proposed user of the house would be a breach of the covenant. *Hobson v. Tulloch* (1898), 1 Ch. 424, 67 L. J. Ch. 205, 78 L. T. Rep. 224, 14 T. L. Rep. 241, 46 Wkly. Rep. 331 (1898).

In this respect the court said: "From the evidence it appears that the defendant intends using it for carrying on, what, in fact, amounts to a boarding house for the purpose of her school, by taking in the governesses and some of the pupils on ordinary paying terms. The house will become an adjunct of the school. It is practically to carry on a species of business. The fact that the house is to be advertised in connection with the school is immaterial. I consider that the proposed user will clearly be a breach of the covenant, and I so decide."

§ 134. Private residence.—Charitable institution for girls.

It has been held that the erection of a large building, capable of accommodating one hundred children, for a charitable institution supported by voluntary contributions, was an infringement of a covenant providing that the premises should be used for private residence only, and not for any purpose of trade. *German v. Chapman*, L. R. 7 Ch. Div. 271, 47 L. J. Ch. 250, 37 L. T. Rep. 685, 26 Wkly. Rep. 149 (1877).

In this case the court said: "The case must be decided upon the plain meaning, whatever that may be, of a few English words which we have got before us. The draughtsman who prepared the covenant in this case seems to have thought that it was safer to use few words, and not to dilute those words, or to complicate them with a long string of other

words, by reason of which difficulties have been created in some of the cases to which we have been referred, and in construing these words I think we must always have regard to this, that they are restrictive words, restricting the common law right of the owner of the land to the person to whom the land has been granted; and, therefore, if there be any ambiguity in the words, or any reasonable doubt as to their meaning, no doubt this must be taken into consideration, so that in every case the plaintiff coming here to seek the assistance of the court must bring his case within the plain meaning of the contract which he is seeking to enforce.

. . . It has been contended before us that those latter words, 'and not for any purpose of trade,' are in some way to be used, or may be considered as restricting or defining or limiting the former words—that is to say, that the sole object of all those words to 'be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade' is simply to say that it shall not be used for any purpose of trade; because unless it goes to that extent, it appears to me that it is impossible to draw any line. If it does mean that the building shall not be used for any purpose of trade, and if it is not used for any purpose of trade, then it may be used for any other purpose whatever, that would be striking out entirely from the covenant the words 'used or occupied otherwise than as and for a private residence only.' I am of opinion that you cannot, upon any principle of construction, use the distinct words of the second clause so as to entirely strike out the former words from the covenant. Then, if you cannot give that effect to the words 'any purpose of trade' you have to construe the words themselves, which are then 'used or occupied otherwise than as and for a private residence only'; and we must construe them according to their ordinary meaning. It is not necessary to say what is or what is not in every case a private residence; but to my mind with all deference to the opinion of the Vice-Chancellor, who took a different view, it is impossible to say that, in the ordinary use of English language, the using of a place for a large institution—which may be a very charitable and beneficial institution—for the reception of one

hundred girls to be lodged, boarded and taught at that place, is using it as a private dwelling house. To my mind such an institution is no more a private residence only than a club of gentlemen, or a working men's club, or any other establishment of that kind, where a great number of persons are brought together. It is not a question you can argue upon any philological consideration, or any other consideration except upon the plain meaning of words as understood by the particular individual who applies his mind to it. I have arrived at the conclusion—and am bound to say without any hesitation—that such an institution as this is not in any sense of the word a mere private residence only; and if that be so, this is an attempt to use this building otherwise than as a private residence.”

§ 135. Private residence.—Railway embankment.

A restriction prohibiting the use of land for any except private residences, except private stables used in connection with such residences, would be violated by the construction of a railroad embankment on such land for the operation of trains by electric power. *Luhman v. New York, W. & B. R. Co.*, 81 N. Y. Misc. 537, 142 N. Y. Supp. 860 (1913).

§ 136. Family residence.—Apartment house.

A covenant to erect only a building adapted to family residence on the lot conveyed, and against the establishment of certain specified trades and businesses, is not violated by the erection of an apartment house intended for the residence of a number of families, because the restriction was against the carrying on of business on the property, and restricting it to a place of residence. *Sonn v. Heilberg*, 38 N. Y. App. Div. 515, 56 N. Y. Supp. 341 (1899).

The reasoning of the court in this case was as follows: “It is evident that the parties who entered into the covenant thought to devote the land to residence purposes in contradistinction to business use, and for that purpose aptly described the designated use to which it was proposed to devote the land as a family residence; and, to make this meaning plain, the covenant was made to enumerate certain classes of busi-

ness which might not be carried on upon the property, and for which erections of buildings would not be permitted. It seems clear from this enumeration, that the object sought was to restrict the use to residence purposes. The use of the word 'family,' in no sound sense, qualifies the purpose to which the building should be put. It could scarcely be claimed that, if a single gentleman erected a house upon these premises, three stories in height, he could not be permitted to occupy it, although he had no 'family,' in the ordinary sense of that term. And so we conceive that he might let the apartments in the house to other single gentlemen, without it being supposed that he had violated the covenant restricting the use to a 'family residence.' Suppose that a 'family,' in literal sense, did in fact erect and occupy a house answering the requirements of the covenant, would they be held to have violated the terms of the covenant if they let rooms in the house to other families or boarded them therein? We think not; and, if not, how does the existence of a structure for the use of several families contravene its provisions? The structure does not cease to be a family residence, although more than one family resides therein, and there is no limitation or restriction upon the use of the property save that it shall be used for the residence of a family, and that business shall not be carried on thereon. The proposed structure is in every way adapted to family use, and will be used by families as a residence; and, this being so, the proposed structure is in literal compliance with the covenant. If the parties had in mind the exclusion of a building for the use of more than one family, they should have so stated in their covenant. Not having done so, the court should not be called upon to interpolate it."

§ 137. One residence as meaning one on each lot.

Complainants owned a tract of land which they laid out into streets and lots for the purpose of making an attractive neighborhood for residences. They filed a map of the property entitled "Map of El Dorado, Weehawken, Hudson County, N. J.," in the office of the register of the county. Some of the lots were shown to be twenty-five by one hundred

and five feet in dimensions. They had a deed printed in blank showing a covenant on the part of both parties "that the lot . . (the blank left for the letter s) hereby to be conveyed is not to be subdivided, and that no more than one residence is to be erected *upon the same*." Complainants conveyed two lots with this restriction, and with the letter s to the word *lot*. This action was brought to enjoin the erection of more than one building on the two lots. Held, that the intention of the parties was that there should be no more than one building on each of the lots, and that the defendant was at liberty to erect one building on each of his lots. *Walker v. Renner*, 60 N. J. Eq. 493, 46 Atl. 626 (1900).

The court said: "The scheme of improvement adopted by the complainants, contemplated the sale of lots twenty-five by one hundred feet each, with no restriction on the use for building purposes, except that no more than one residence was to be erected upon each of such lots. This was the scheme of improvement on the faith of which others became purchasers of the lots in this tract of land. Purchasers who bought two lots were at liberty to erect a single dwelling on the both lots, but a purchaser taking a title for any number of lots was at liberty to erect upon each lot a residence, unless the restriction of the deed clearly restrained him from doing so. . . . The division of the tract of land into lots twenty-five by one hundred feet was made by the complainants in their original scheme of improvement, which contemplated the use of each lot twenty-five by one hundred feet for a single dwelling. The language of the restriction in the deed now in question was not to the effect that no more than one building should be built upon these two lots, but it provides that the two lots 'is not to be subdivided,' etc. In the use of the lots conveyed, the defendant, in proposing to erect a building on each lot as the lots were divided in the scheme of improvement, does not subdivide any lot. His purpose is to appropriate the two lots he had bought in compliance with the general plan of improvement adopted by the complainants. Taking the restriction in the deed now in question in connection with the plan of improvement adopted by the complainants, we think that the restrictive clause in this

deed should apply only where the purpose of the grantee is to subdivide the lots conveyed into lots less in size than designated on the map, and that the words 'no more than one residence is to be erected upon the same' applied to each one of the lots conveyed by this deed, and not to both the lots as one tract."

§ 138. One residence only.—Apartment house.

A house composed of three separate and distinct suites of apartments, each of which was to be separately let and occupied, but with one front door and a common entrance and staircase leading to the suites, was held to constitute one residence only, and none the less so because the suites were to be separately let and occupied. *Re Robertson*, 25 Ont. L. Rep. 286, 20 Ont. Wkly. Rep. 712 (1911).

§ 139. Improve with a brick residence.—Erecting additional buildings.

The owner of a tract of land conveyed a corner lot and inserted in the deed the following provision: "It is a condition of this conveyance that said lot, when improved, shall have on it a brick residence, not less than two and a half stories high, and that said residence shall front on Ormsby avenue, and the front line of same shall not be nearer to Ormsby avenue than the front line of the Morat homestead now on same block." When the grantee erected the house in question it complied with all the terms of this provision. The grantee then erected on the rear of the lot other brick residences of the same kind facing on the side street. Held, that the improvements on the rear end of the lot were not contemplated by the provision in question and that they did not constitute a violation of it. *Roberts v. Porter*, 100 Ky. 130, 37 S. W. 485, 18 Ky. L. Rep. 650 (1896). Construing this provision, the court said: "The chief question here, however, is, what is the extent and meaning of the condition? Confessedly, the lot has on it a brick residence not less than two and one-half stories high, fronting on Ormsby avenue, and the front line of which is not nearer than the front line of the Morat homestead; and it seems to us that if further

prohibitive stipulations were intended they would have been inserted. The frontage of the residences on Ormsby, their size and quality, and the distance the houses were to stand from that avenue, were the chief points of interests. We do not believe the improvement of the rear of the lots was in the mind of the grantors at all, but only the Ormsby avenue end, yet it is likely that no other than the brick residence of the kind described could be built anywhere on the lots. This might be assumed to have been the intention of the contracting parties, and, if so, the appellee still has not violated the condition, as the houses are of the kind required. It does not follow, as suggested by counsel, that, if the appellee may thus erect houses on the Second street end of her lot, she might, after complying literally with the conditions in the deed and erecting a two story and a half brick residence on the line with the Morat house, and fronting on Ormsby avenue, also erect additional houses on the Ormsby end of the lot. As we have seen, the protection of this frontage was a special matter of interest, and any encroachment thereon is especially provided against."

§ 140. Private dwelling or residence only.—Letting of rooms.

Premises were leased with a covenant on behalf of the lessees to "use such premises for the purposes of a private dwelling or residence only, except on a special permit from the company." It was held that the renting of rooms, in their buildings on such leased premises, to temporary occupants, by the lessees constituted a violation of such restrictive covenant. *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576 (1900).

In this case it was insisted by the defendants that as they were not restricted as to assignment or under-letting by the leases, they might sub-let or assign as they saw fit, even to the extent of renting all the rooms in the house to as many different tenants. In this respect the court said: "This is no doubt true as an abstract proposition of law; but in these cases it is limited by the covenant that they shall use the property for the purposes of a private dwelling or residence

only, except on special permit from the company. They may exercise their right to assign or sub-let freely until they subject the property to uses other than that of a private dwelling or residence. The moment they do that they have broken the covenant unless they have done it under a special permit from the company. Now have they subjected the property to a use different from that covenanted? For it is admitted by the defendants that they have rented rooms in their dwellings without permission from, and in defiance of, the company. The findings of the circuit court indicate that they have done this so systematically, and to such an extent, as to amount to a business. Yet they insist that each house is still a dwelling house, or at least a collection of dwellings. 'Each of such tenants,' says the counsel for defendants, 'used his apartment for the purposes of a private dwelling.' But the plain provision of the covenant is that the leased premises shall be used for the purposes of a dwelling or residence only, not for a number of dwellings. More than that, they are restricted to use of it for a private dwelling or residence; and that is not a private dwelling or residence which is used in the business of renting rooms to lodgers or tenants."

**§ 141. Lessee to occupy residence "only for herself."—
Marrying man with children.**

Complainant leased certain premises, including a dwelling house, to his mother for life, and in the body of the lease it was provided that they were "only for herself to occupy for a residence." It was further provided that upon any violation of the covenants in the lease, said lease should thereby terminate. Subsequently the lessee married a man with four children, and all of them came to reside with her upon the leased premises. Held, that such use of the premises did not constitute a violation of the terms of the lease. *Schroeder v. King*, 38 Conn. 78 (1871). In this respect the court said: "If the lessor had designed to furnish his mother with a home during her widowhood, he would have used language clearly expressing such intent, and would not have left it to be inferred from language of doubtful meaning. The lease

as drawn, we think, may fairly and reasonably be interpreted as to allow the lessee to receive a relative, friend, or husband, as a companion. In some respects the case is an extreme one. Had the lessee married a man without a family, there would have been scarcely an appearance of hardship in the case. The only difficulty, if any, arises from the number of children. But that difficulty is more apparent than real. The case does not find that the lessor will be thereby prejudiced—the covenants against waste and repairs being sufficient, if kept, to save him harmless—while there is a practical difficulty in drawing the line anywhere between living in solitude, and living with as many as the house will comfortably accommodate. We are not disposed to construe the lease so as to compel the lessee to live alone, unless it clearly appears that such was the intention of the parties. As such intention does not appear, and the parties having failed to indicate any other limit to the number of persons who should occupy the house, we cannot say that the terms of the lease have been violated.”

§ 142. “Houses” as meaning dwelling houses.

In a deed conveying land for the erection of an expensive residence the grantor covenanted that not more than two “houses” should be erected on the residue of the land owned by him. The word “houses” was held to mean dwelling houses. *Schenck v. Campbell*, 11 Abb. Pr. 292 (1860).

“It is perfectly obvious,” said the court, “in what sense the plaintiff construed the covenants in the deed. If the words ‘two houses’ have other meaning than two dwellings, of the general character and description adopted and used in that particular locality for private residences, to him the covenants were a ‘delusion and a snare.’” And further the court remarked: “If an advertisement should appear in one of our city newspapers, offering for sale or to be let two houses situated on the Fifth avenue, between Forty-second street and the Parade Ground, it seems to me not unreasonable to suppose that the great majority of the readers would be disappointed upon being advised that it did not refer to first class dwelling houses; and the astonishment of all of com-

mon understanding would, I think, be quite general, when informed that the two houses were simply places of shelter for horses, and not intended as a habitation for man."

§ 143. One house.—Two apartments on different floors.

A covenant to erect not more than one house on the land in question was held to be violated by a building structurally divided into two tenements on different floors, without any internal communication, common staircase, or common front door; it being held that such a building constituted two houses. *Ilford Park Estates v. Jacobs* (1903), 2 Ch. 522, 89 L. T. Rep. 295, 19 T. L. Rep. 574, 72 L. J. Ch. 699, 1 B. R. C. 988.

In this case Swinfen Eady, J., speaking for the court, said: "I must deal with the plan before me without regard to possible modification. A common door could, however, be put to two semi-detached houses, if the separate entrances were recessed under one arch, and the common door placed in front of them. They would remain two houses in spite of the common front door, and in spite of any internal communication that might be made. The common staircase, common front door, and internal communication, do not make two houses into one nor their absence make one house into two.

. . . The plaintiffs contend that the erection of the proposed buildings is a breach of the fifth stipulation, on the ground that each building consists of two houses separated horizontally, and not vertically. It is not disputed that if the defendants were to erect a building consisting of two semi-detached houses, vertically separated by a party wall, it would constitute two houses within the stipulation. But the defendant contends that each building in the present case is only one house. Now there is no internal communication between the ground floor and first floor tenement. There is no staircase to the two tenements. No staircase is, in fact, required for the ground floor tenement. There is a private staircase leading to the first floor tenement and a separate staircase from the kitchen of that tenement to a separate water closet on the ground floor in the rear of the building. There is no common front door, but each tenement has a separate front door, and the only way of passing from one

tenement to the other is by going out at one front door or to the small space under the archway facing the street and entering at the other front door. . . . Now in this case there is no question of one house being built and then used as two houses. In substance each house constitutes two houses, which are structurally separate in every respect, with separate approaches to the street and no internal communication. It is quite different from a case where one building is erected containing separate flats. In that case there is internal communication between the flats by means of the common staircase. In the present case there is no internal communication whatever. It is merely a case of one house superimposed upon another from which it is divided horizontally, while in the ordinary case of semi-detached houses the division is vertical. The question whether, with a slight modification of the plans each building can be converted into one block of two flats, is not material. I have to consider the building shown on the plan before me, and in my judgment each of them constitutes two houses."

In England it has been held that a building divided horizontally, the first floor being occupied for business purposes, and the second floor as a residence, may be termed two houses within the meaning of a statute providing that, "every house or tenement which is occupied solely for the purposes of any trade or business or any profession or calling by which the occupier seek a livelihood or profit shall be exempted from the duties (on inhabited houses) by the said commissioners upon proof of the facts to their satisfaction." *Grant v. Langston* (1900), A. C. 383.

In this case it was said by Lord Brampton: "One roof covers the whole building, but each story is so structurally composed and arranged for permanent occupation by a separate occupier that there is no internal communication of any kind between the two stories, nor any common staircase or access to or from the street, or from any part of the outside of the premises, each having a separate entrance or entrances therefrom. In short, it would be impossible to erect two separate houses under one roof, or to divide one building into two distinct and separate houses more completely than

has been accomplished in the building under consideration. Indeed, before the appellant opened the lower house or story as a public house, it was let to a separate tenant, the appellant occupying only the upper house or story as he does now. No person resides in the licensed premises. In law I think that each of these stories constitutes a distinct and separate house, each of which if inhabited as a dwelling should be separately assessed to the duty imposed by the statute, but neither of which should be legally so assessed unless so used. They are not the less two houses because they are both owned and occupied by one and the same person."

§ 144. Not more than one house.—Flats.

A restrictive covenant prohibiting the erection of "more than one house" on each lot conveyed, is not violated by the erection of a flat building, two stories high, designed for two families, one on the first and one on the second floor; the same constituting only "one house" within the meaning of the restriction. *Pank v. Eaton*, 115 Mo. App. 171, 89 S. W. 586 (1905).

"What we have to decide," said the court, "is the force of the stipulation against more than one house on each forty feet of ground. In other words, we have to determine whether the structure defendants proposed to erect was more than one house. In a recent case we went into the subject of restrictive covenants in deeds where the prohibition was against more than one dwelling on a lot. Such a covenant deals with the use of the premises and is intended mainly to prevent plural occupancy of a lot; whereas the present covenant is not. Hence, an interpretation ought to be given to the present covenant which will uphold the intention to exclude plural structures rather than plural uses. The purpose to be derived from the words employed was to prevent the erection of more than one house on each lot. In our opinion a building of the sort described is one house and not two. . . . To our minds this case is clear. If the grantor desires to restrict the use of a single lot for dwelling purposes to a single family, apt words for the purpose could have been used. No intention of the kind can be drawn, with any confidence, from

a covenant against more than one house. The upper and lower stories of a flat may be two dwellings, but they certainly are not two houses according to any use of the word 'house' prevalent in this country; and in our judgment the best authorities support this view."

It was further held in a concurring opinion in the above case that where the covenant prohibits the conduct of certain business, as this covenant did, on the premises and places a minimum cost for a 'dwelling' house, these provisions tend to show that a flat of the kind described is not more than 'one house' within the meaning of the covenant.

Lots were sold subject to a restrictive covenant that not more than two houses shall be erected on any one lot. Held that a block of flats constituted one house only within the meaning of the restriction. *Kimber v. Admans* (1900), 1 Ch. 412, 82 L. T. Rep. 136, 16 T. L. Rep. 207, 69 L. J. Ch. 296, 48 Wkly. Rep. 322.

In this case it was said by the Master of the Rolls: "What is the meaning of the word house in this covenant? In my opinion it does not refer to the mode in which the building is subdivided and let, but to the aggregate of the rooms making up the building. No doubt for some purposes a portion of a house is treated as a house, as for the purpose of rating or the franchise, but I cannot agree that the word 'house' is used in this sense in this covenant. In covenants of this kind no one would apply the word 'house' to the interior portions of the building. It would be taken as meaning the whole structure. There is no doubt that this covenant refers to the building as a whole, and not to the interior parts."

§ 145. One house.—Stable erected before house.

A parcel of land was conveyed with a covenant on the part of the grantee not to "erect or build more than one house on the property hereby conveyed," and with other provisions as to the cost of the materials of the house to be erected and as to the distance of its walls from the boundaries of the parcel. Subsequently a stable was erected thereon prior to the erection of any residence. It was held that this did not constitute a breach of the covenant as the defendant had the

right to build the stable as appurtenant to a house to be afterwards erected. *Hime v. Lovegrove*, 11 Ont. L. Rep. 252 (1905), affirming 9 Ont. L. Rep. 607.

In this case the court said: "Does this restrict the covenantor or his successors from building a stable as appurtenant to a house to be afterwards erected of the character and in the situation described in the covenant? I agree with Justice Street that it does not. The object of the covenant is to maintain the high residential character of the neighborhood. It is directed against the building of more houses, dwelling houses, than one upon the parcel conveyed, not against the 'erection of any building whatever except' a dwelling house or private dwelling house, nor of a building which is commonly or frequently appurtenant to a substantial or high class dwelling house, and is the more likely to be so the more costly and substantial the house. If the house had been built first, I think it would be impossible to say that the erection of the stable as appurtenant to it would be inconsistent with the covenant." But see *Highland Realty Co. v. Groves*, 130 Ky. 374, 113 S. W. 420 (1913), holding that the erection of a stable alone on land was a violation of a restriction prohibiting the use of the land for other than residence purposes.

§ 146. Private house.—Private sanitarium.

A "private house" is a private dwelling, and a dwelling is a place or house where a person lives. A "private house" is one in which a person or family live in an individual or private state. Hence, a restrictive covenant providing that any buildings erected on the land conveyed should be first class "private houses" is violated by the use of a private dwelling on the premises for a private sanitarium. *Barnett v. Vaughan Institute*, 134 N. Y. App. Div. 921, 119 N. Y. Supp. 45 (1909).

In this respect the court said: "In these days of apartments, I am not giving to the words a narrow meaning. But a house intended for a private residence or home is not intended for a place for the temporary gathering of diseased persons for treatment. If the covenant means that there shall be erected upon the premises only buildings intended

for a house or private dwelling, it is the merest evasion to defeat the intention by using the structure for what a private dwelling is not used. Then that which was a private dwelling is no longer such. It is not a place where a person or persons reside. It is in this instance the seat of the Vaughan Institute, an entity incorporated for the purpose of treating persons afflicted with rheumatism or nervous diseases, for education respecting the same, for manufacturing and selling remedies, etc., and such institute uses such premises for treatment of persons pursuant to its charter. The building looks like a private dwelling. It is not one. The plain fact is that a dwelling house is recognized by its appearance and use. If it be appointed to a business, it is a dwelling house no longer, save to those ignorant of its use. I would preserve the substance of the covenant and enforce it according to the ordinary intendment of the words used."

The same covenant provided that the houses shall stand back at least twenty feet from the street line, and was further held not to be violated by moving a first class dwelling to the rear of a first class private house erected in accordance with the covenant, with a space between the two buildings. *Barnett v. Vaughan Institute*, 134 N. Y. App. Div. 921, 119 N. Y. Supp. 45 (1909).

Here the court said: "The two houses, separated or conjoined, might not accord with the highest and best standards of architectural judgment. But dimensions are not a sure criterion, and what to the eye of one seems unfitting to that of another seems harmonious. There are houses that cost largely and are approved by architects of repute that seem disproportioned and ugly, or even grotesque to others."

§ 147. Private house.—Stable erected before house.

A covenant that lots sold should have erected thereon private houses only, to be of at least of a specified value, was held not to be broken by the erection on one of them of a stable with a bed-room over it, of such dimensions and of such position that it would still be possible to build a house of the stipulated value on the plot. *Russell v. Baber*, 18 Wkly. Rep. (Eng.) 1021 (1870).

In this case the court said: "The ground was planned so that there might be one house on each lot, but this gentleman buys six lots, and builds one house much larger than was contemplated, and a stable as appurtenant to it. I cannot think that there is anything in that that is a breach of the stipulation. He might even now build a house on lot 14, where the stable stands, which should answer the first stipulation, and the existence of the stable would not interfere with it. He has only exercised his rights of ownership, and has not infringed the covenant." But see secs. 127, 145, *ante*.

§ 148. Private house.—Auction sale of its contents.

It has been held that a covenant to use a house as a private house only is not violated by the holding of an auction sale on the premises of the furniture belonging to the house. *Reeves v. Cattell*, 24 Wkly. Rep. (Eng.) 485 (1876).

§ 149. Tenement.—Apartment house.

In a New York case decided in 1877, it was held that a restriction against the erection of a tenement house was violated by the erection of a French flat or apartment house. *Musgrave v. Sherwood*, 53 How. Pr. (N. Y.) 311 (1877).

It was said by the court in this case: "The point is not free from difficulty, but reflection has satisfied me that the proposed erection is within both the spirit and the letter of the expression. The obvious object of such a provision was to free the premises from the confusion and disquiet which must surround any building which is the abode of several distinct families. That the grantor intended to dedicate and preserve the property to and for the use of first-class private dwelling houses is clear; and while it is conceded that the annoyance and discomfort arising from the occupation of defendant's structures for the purposes designed would be somewhat less than if they were to be the abodes of the poorer classes, it is still manifest that the distinction is in degree and not in kind. The bustle, confusion and want of privacy which the grantor intended to guard against, would necessarily be present, and to that extent, at least, his intention would be defeated."

"It was strenuously urged by the defendant that the expression 'tenement-house,' must be confined in meaning to the abodes of poor families who, as tenants, occupy a single building. One difficulty attending this definition is, that there is no fixed standard by which poverty and wealth can be measured. How many dollars must an individual have to be entitled to be called rich, and how few must he possess to be regarded as poor? Will the name of the building change as the occupants change? Manifestly, it seems to me, not. Some other definition than one which shifts and changes with the families occupying it must be sought for. The word 'tenement,' according to Bouvier, in its larger sense, 'comprehends everything which may be holden, provided it be of a permanent nature.' According to the same author it also signifies a 'house or homestead,' and as defined by Jacobs in his law dictionary, which Bouvier quotes, 'rooms let in a house.' The compound word 'tenement-house' must, therefore, signify and means a house with distinct tenements or homes, which separate and different families or persons occupy as tenants. Not merely a boarding house or hotel, for in these the occupancy is not one of tenancy, but that of guests or boarders."

This case seems not to have been followed in that, or any other state. It has since been held that a covenant against the erection of any tenement house on the land conveyed is not violated by the erection of a modern apartment house, seven stories high, with two apartments to each floor, having the conveniences and appliances of the best of such houses, and having the external appearance of first class dwelling houses in the immediate neighborhood. *Kitching v. Brown*, 92 N. Y. App. Div. 160, 87 N. Y. Supp. 75 (1904), affirmed in 180 N. Y. 414, 73 N. E. 241, 70 L. R. A. 742 (1905).

In *Marx v Brogan*, 111 N. Y. App. Div. 480, 98 N. Y. Supp. 88 (1906), a restriction against the erection of any tenement house was held not to be violated by the erection of a modern apartment house of superior construction. It was declared in this case: "That there is a wide difference between a tenement house and an apartment house (and in the construction of covenants, such as that involved here, such difference is recognized by the courts) is well settled. While there is no

actual legal definition of a tenement house, still, in the year 1889, when the covenant between these parties was made, and even prior thereto—the difference between such a house and an apartment house was a matter of common knowledge. In the submission the parties to this controversy have called the defendant's proposed building an apartment house, and the details of construction appearing in the record indicate its superior quality. In order to bring the structure which the defendant intends to erect within the operation of the restrictive covenant it is necessary for the plaintiff to show that it is what was known and understood to be a tenement house within the meaning of that covenant. That he has failed to do. With the recognized distinction between apartment and tenement houses the court cannot assume that the covenant will be violated by the defendant putting up a building of the character described in the petition."

In the year 1873, when certain property was conveyed by deed containing a covenant against the erection of any "tenement house," such structures were understood to mean houses containing suites of rooms renting for from six to fifteen dollars a month, to persons of very limited means, and at such time modern "apartment houses" were unknown. Held, that such covenant did not prohibit the erection of a modern apartment house equipped with all modern conveniences and appliances, and renting for from six hundred to eleven hundred dollars each a year. *White v. Collins Building & Const. Co.*, 82 N. Y. App. Div. 1, 81 N. Y. Supp. 434 (1903).

Relative to the construction of this covenant the court said: "In considering this covenant we are to ascertain the intention of the parties to the conveyances of which the covenant is a part, and give it due effect. Particular words in such a covenant are to be given the meaning that were commonly given to them at the time the instrument containing the covenant was executed. In ascertaining the intention of the parties, the whole instrument must be considered, and, when the various uses of the property which were prohibited are considered, it becomes apparent that what was intended was to prevent the use of the premises in any way that would be a nuisance to the adjoining property. A great number of

uses are prohibited, all of them of a kind that produce disagreeable odors or noises, or attract to the neighborhood large crowds of undesirable persons. Thus, there is prohibited, slaughter house, meat shop, tallow chandlery, manufactory of glass, which would tend to produce disagreeable odors, and make the neighborhood undesirable for residence; steam engine, smith shop, forge, furnace, brass foundry, which tend to create smoke and noises; drinking or lager beer establishment, circus, menagerie, or public show, which tend to attract to the neighborhood people that are not desirable in a residential locality. 'Tenement house' is bracketed with a railroad depot, railroad stable or car house, and it would seem that the intention was to prohibit those uses which would tend to injure the general character of the neighborhood, and make it inappropriate for the residences of refined and prosperous people. It is common knowledge that in the year 1873 and prior to that time modern apartment houses were unknown in the city of New York, and the parties in their statement of fact stipulate that 'an apartment house, as such, was unknown in 1873; the word "apartment house" only came into use about 1880'; that 'an apartment house is a building used as a dwelling house for several families, each family living separate and apart from the others; that the building is commodious, and is very handsome in outward and inward appearance, and fitted with every modern appliance for the comfort of tenants; that each separate family uses the main hall for an entrance to the building; each suite of rooms is a dwelling house, with a separate hall, water closet, bath, and in itself complete in every detail'; and that the defendant 'proposes to erect and build upon the premises in question an apartment house which shall be in all respects of the highest class. It is to be built to comply with all modern demands for the comfort and convenience of the tenants, and to comply with law. It is to be used exclusively for residential and family purposes. That the building will be six stories in height. Its exterior will be brick and stone of the best quality. That the entrances to the building from the street will be of marble. Chairs, desks, and paintings are to be placed in these main entrances. That there will be from five to seven

suites of rooms on each of the six floors. On each floor there are to be apartments of five rooms and bath, six rooms and bath, and seven rooms and bath. In each suite of rooms there will be a hall, parlor, dining room, bed room, kitchen, servant's room, a tile bath and water closet. That each separate apartment will have a private hallway, a dumb waiter, wardrobe, mirrors, separate washstands, separate toilet, hot and cold water, and gas ranges. That the rental value of these apartments will be graded according to the location of the apartment'; the lowest rental to be about six hundred dollars a year, the highest about eleven hundred dollars a year.' The parties have also stipulated as to what was known in the year 1873 as a 'tenement house,' and this description is substantially different from that of an apartment house as defined. It is stipulated that suites in a tenement house rented for from six dollars a month to fifteen dollars a month, according to the number of rooms, and were rented by people of very limited means.

"Comparing this statement of the definition of a tenement house, as existing in 1873, with the definition of an apartment house when that term came into common use, and the description of the building that the defendant intends to erect; considering the object for which this covenant was intended, and the nature of the various uses that were prohibited—it must be apparent that the building that the defendant proposes to erect is not a tenement house within the meaning of the covenant, and was not in the contemplation of the parties when the instrument containing the covenant was executed. An apartment house, the erection of which is contemplated by the defendant, would clearly not be a use of the property which would be dangerous, noxious, or offensive to the neighboring inhabitants. What was clearly contemplated was that a tenement house, as then known and in use in the city of New York, should not be erected upon the property. The erection of a hotel was not prohibited, nor was the use of the property restricted to dwelling houses so constructed that one dwelling should be under one roof. The restriction was confined to one particular residential use, viz., a tenement house. The fact that hotels, boarding houses, and houses of that character,

which were then common in New York, were not prohibited, would seem to show that the parties did not intend to restrict the premises to residences of a particular kind. What was contemplated was that the building of a tenement house, as then understood in New York, should not be allowed."

§ 150. Tenement.—Family hotel.

A "family hotel" is not a tenement house, and does not violate a restriction against a tenement house. *Musgrave v. Sherwood*, 54 How. Pr. (N. Y.) 338 (1878).

The hotel in question was known as the "Sherwood House." It was not designed for the accommodation of transient guests or casual boarders. Rooms in suites or singly, on the different floors, were taken by families or individuals for some period. The cooking for all the guests or residents of the hotel was done by the proprietor on the premises, the house having been provided with all the means and appliances for the purpose; no cooking or laundry work was allowed in the rooms of the guests.

§ 151. Flat defined.—Question of fact.

A building consisting of more than one story, in which building there are one or more suites of rooms on each floor equipped for separate housekeeping purposes, is a "flat." *Lignot v. Jackle*, 72 N. J. Eq. 233, 65 Atl. 221 (1906). Commenting on this question the court said: "It should first be observed that in my view the floor completely equipped for housekeeping purposes must be in a building in which there are other floors, because I do not think that a bungalow or ranch building all on one floor has ever properly been termed a 'flat' or the building a 'flat house.' In this country flats or flat houses have usually been built of many stories upon each floor of which buildings there has been one or more suites of rooms fitted up for housekeeping purposes. The query is, how many stories so equipped must there be to constitute the building a 'flat' or 'flat house?' In default of any arbitrary definition established either by positive enactment or by decision, I think it must be held that any building consisting of more than one story, in which building there

are one or more suites of rooms on each floor equipped for separate housekeeping purposes, is a 'flat' or 'flat house.' I do not see how the court can apply any other test that is reasonable. A floor equipped for separate housekeeping is a 'flat.' A building containing such 'flats' is a 'flat house.' If two such floors do not constitute it, how many would? There is no answer of which I am aware. The fact that it has not been customary to erect 'flat houses' of only two stories cannot alter the conclusion. I do not see upon what one could base a finding that a 'flat house' must consist of more than two stories."

The word "flat," as it appeared in a restrictive covenant prohibiting the erection of flats or tenement houses on the property conveyed, was held to have no technical meaning, and that where the testimony was conflicting as to whether the building was or was not a flat, the question was one of fact. *Godfrey v. Hampton*, 148 Mo. App. 157, 127 S. W. 626 (1910).

In this case it was said by the court: "We are not aware that the word 'flat' has a technical legal meaning so the court can pronounce absolutely one way or the other as to whether a building is a flat or not. No doubt testimony might be taken which so conclusively showed the truth about a building in controversy as to compel a ruling one way or the other. But where the testimony is contradictory, as in the case at bar, the question would seem to be one of fact. Of course the purpose to be achieved by the restrictive covenant should be kept in mind, and, looking at the covenant before us, we incline to hold it was inserted in the deeds to the lot in question and other lots in the vicinity to prevent plural occupancies by families of the houses on the street; that is to say, to prevent the houses from being used by more than one family, each living to itself on different floors fitted up separately for housekeeping. This purpose to prevent plural occupancy in the sense stated is suggested by there being a covenant against tenement houses as well as one against flats. A construction of the covenants which would make them tolerate a house arranged as the one in question was meant to

be, and for the use of two families, each keeping house for itself by means of fixed conveniences put on both floors, merely because there will be a common front entrance, would defeat the object of the covenant. There were separate entrances in the rear, and a part of the plan of improvement was to turn an upstairs window into a door opening onto the rear upper porch, through which the family living upstairs would have access to a stairway leading from the upper porch to the yard. We think a building of that character would cause all the mischief intended to be prevented by the covenant, would depreciate the value of the property, and diminish the attractiveness of the neighborhood as a place of residence. We hold that, on the evidence, the court below, as trier of the facts, might find a scheme of improvement projected by defendant Hampton would convert her building into one of the character known as 'flats,' and therefore would violate the covenant."

§ 152. Flat and apartment distinguished.

A deed of conveyance contained the following restrictive clause: "During the said fifteen years said land shall be occupied and used by the said party of the second part, its successors and assigns, including all tenants, for residence purposes only and not otherwise, which is to be taken to exclude flats and apartment houses." In construing the terms of this clause, the court said: "The terms of the covenant, as expressed in the first clause hereinabove set out, clearly exclude and forbid flats and apartment houses. And it is also directed at the occupancy and use of buildings as such. That is, although the building may not in its exterior appearance be an apartment house and may not be internally arranged so as to contain flats or constitute an apartment house, yet if it is occupied and used as such, then it is within the things forbidden by the covenant. Strictly speaking, a flat is one floor or portion of a house which forms a complete residence in itself. Therefore the term 'flat' is not synonymous with 'apartment house.' The latter term connotes an entire building; while the former means only the separate

residential portions inside the building. So that, the clause forbids not only a building designed for an apartment or constructed with flats therein, but it also forbids the use and occupancy of a house in such way as to turn it into flats or make it an apartment house. The first clause deals with the occupancy and use of the building on the lot, confining both the building and the lot to residence purposes only, and by the words 'which is to be taken to exclude flats and apartment houses' definitely and emphatically excludes plural occupancy." *Kenwood Land Co. v. Hancock Investment Co.*, 169 Mo. App. 715, 155 S. W. 861 (1913).

§ 153. — by amount of rental.

It has been maintained that the amount of rental paid for a suite of rooms in a building may be a determining factor as to whether it is a flat or an apartment house. But it has been held, considering this to be true, that the payment of thirty-five dollars to forty dollars per month for a suite does not turn what otherwise constitutes a flat into an apartment house, so as to take the building out of a restrictive covenant against the erection of a flat on the premises. *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221 (1906).

The court said: "Furthermore, I do not find that the amount of rent to be charged for these suites, namely, thirty-five dollars to forty dollars per month, brings the same within the definition contended for by the defendant. His sole contention on this head is that what is otherwise a flat house becomes an apartment house when a certain amount of rent is charged. It is admitted that there is no standard with respect to what amount of rent converts a flat into an apartment; but fairness to the defendant does not require from him an absolute definition, provided there is any reasonable method of ascertaining the limit. Undoubtedly, if the distinction be a true one, there are means and extremes about which there could be no question. A suite renting for ten dollars a month would then undoubtedly be a flat; whereas, one renting at one thousand dollars a month would undoubtedly be an apartment. Granting, therefore, for the sake of the argument, that there is this distinction, and that it is a real

one, I do not find that thirty-five dollars to forty dollars a month rent turns what is otherwise a flat into an apartment."

§ 154. Forbidding erection of flat or residence near street line not applicable to garage and storeroom.

A restriction forbidding the erection of a "flat building or tenement house on said premises" or "any residence or dwelling house nearer to the street line" than designated dwellings on adjoining property, is not violated by the erection of a garage and storeroom on the street line of the premises. *Jones v. Williams*, 56 Wash. 588, 106 Pac. 166 (1910).

It was said by the court in this case: "Learned counsel for the respondents contend that the 'garage and storeroom' which they allege appellant is proceeding to construct is in violation of this restriction. It is plain that the building of such a structure on the premises would not be a violation of the building restriction in the deed unless it can be said such structure is included in the terms 'flat building,' 'tenement house,' 'residence,' or 'dwelling house.' It also seems plain that none of these terms as ordinarily understood includes 'garage' or 'storeroom.' But learned counsel for respondent contend that, 'The clear intention of the parties to the original deed containing the restriction, was that there should be no building erected on said premises nearer the street line, than on a line with two residences then on either side of said lot.' If this be the intention of the parties to the deed containing the restriction, it is difficult to understand why they did not make such intention plain by using some simple, comprehensive term such as 'no building,' instead of specifically enumerating certain buildings by names, having well recognized meaning, and stopping there. The painstaking effort to particularize is very suggestive of an intent to exclude all other structures from the language of the restrictions. It seems to be well settled law that words in a deed of conveyance restricting the use of the property by the grantee are to be construed strictly against the grantor and those claiming the benefit of such restrictions, and will not be extended beyond the clear meaning of the language so used."

§ 155. Restrictions relating to construction and not use of residences and dwellings.

It might be thought that when land is conveyed and the building to be erected thereon is restricted to a residence, the use of the building would be impliedly limited to residence purposes. But the contrary has been held.

Where it was specified that the first building to be erected on the land granted should be a private dwelling of brick or stone, not less than three stories in height, planned and adapted for the residence of private families, or buildings for churches, and that a tenement, flat, or apartment house was not such a building, it was held that the building could be put to any purpose. *Kurtz v. Potter*, 44 N. Y. App. Div. 262, 60 N. Y. Supp. 764 (1899), affirmed in 167 N. Y. 586, 60 N. E. 1114 (1901).

A covenant against the erection of any "tenement house," or any "house except private dwellings," has been held to be violated by the erection of a three-story building, each floor of which constituted one complete apartment for housekeeping. It was further held that the fact that defendant did not intend to have it occupied by three families was immaterial, as the covenant was against construction and not use. *Levy v. Schreyer*, 27 N. Y. App. Div. 282, 50 N. Y. Supp. 584 (1898), reversing 19 N. Y. Misc. 227, 43 N. Y. Supp. 199 (1897).

"The covenant," said the court, "is one against construction, and not against use. The manner in which the owner proposes to occupy it is of no importance, since the question to be determined must, of necessity, turn upon the construction of the building, and not upon the use to which it is to be put. It is constructed so that it can be occupied by three families living separate and apart. This characterizes the building, and prevents it, as it seems to me, from coming within the class of buildings which the parties termed a private residence. The trial court laid stress upon the fact that it was intended to be occupied by only two families, but this is of no importance, since the covenant, as we have seen, relates to construction, and not to use. No matter how the present owner may intend to use it, the fact remains that he

is proposing to construct the building with three separate and distinct apartments, and in such a manner that they may be occupied by three families living separate and apart. Such building is not a private residence within the true intent and meaning of the parties to the deed above referred to."

A restrictive covenant that the owners will not "at any time hereafter erect on any of the lots or lot owned by them respectively any building except brick or stone dwelling houses of at least two stories in height, and except buildings of brick or stone for private stables," is not violated by the use of such premises for a dressmaking establishment. *Clark v. Jammes*, 87 Hun 215, 33 N. Y. Supp. 1020 (1895).

"It is conceded," said the court, "that the house erected upon these premises was erected as a private dwelling house, and has all the exterior appearances of such a building. But it is urged in support of the injunction that, under such a restriction as was contained in the covenant in question, it could not be used for a dressmaking establishment, or for any commercial purpose. We cannot find in the terms of the covenant any such restriction. The requirement of the covenant is fulfilled by the character of the building, and any occupation which may leave the building of the general character of a private dwelling house does not seem to violate this restriction. This view is accentuated when we consider the balance of the covenant. It reads as follows: 'And further, that neither he nor they shall or will, at any time hereafter, erect or permit upon such lots, or any part of the same any livery stable, slaughter house, smith shop, forge, furnace, steam engine, brass foundry, nail or other iron factory, or any other manufactory of gun powder, glue, vitriol, ink or turpentine, or tanning, dressing or preparing of skins, hides or leather, or any brewery, distillery, museum, theater, circus, place for the exhibition of wild animals, or any other erections known as nuisances in the law.'"

"It will be seen that the parties evidently contemplated that the first part of the covenant to which attention has been called did not restrict the use to which the premises were to be put. It only designated the character of the building which was to be erected upon the premises, and they thought

it necessary, in order to exclude its occupation for purposes which were considered detrimental to the neighborhood, to put in a provision prohibiting the permission upon said lots or any part of the same of such occupation. A consideration of the whole of the restrictive covenant, therefore, seems to lead inevitably to the conclusion that in its construction it is necessary to hold that the occupation of a portion of a house erected for a dwelling house for any purpose not within the prohibition contained in the last clause of the covenant does not come within its restrictions."

CHAPTER VI.

RESTRICTIONS RELATING TO VARIOUS TRADES AND BUSINESSES.

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- § 199. Dangerous, noxious, unwholesome or offensive.—Livery stable.—Bake ovens.—Boarding house.
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- § 210. Court house and jail.—Stable.
- § 211. Livery stable.—Private club stable.
- § 212. Studio and salesroom.—Saloon.
- § 213. Dry goods jobbing business.—Business of auctioneer.
- § 214. Oil cloth and dry goods store.—Auction sales.
- § 215. Use of land for sale of intoxicating liquor.—Sale by druggist.
- § 216. Manufactories.—One not known at time restriction made.
- § 217. Manufactory.—Electric light plant.
- § 218. Business of a publican.—Licensed spirit grocer.
- § 219. Town house only.—Partly used for other purposes.
- § 220. Opera house of the first class.—Second class plays and vaudeville.
- § 221. Against building on premises.—Addition to old building.
- § 222. Trade of butcher.—Selling raw meat at retail.
- § 223. Divine service.—Sunday school.
- § 224. Church purposes.—Abandonment.
- § 225. School purposes and uses consistent therewith.
- § 226. Covenant to keep premises clean.

§ 156. Business defined.

The word "business" is one which is used with widely variant meanings. It is used broadly to signify "that which

busies, or engages time, attention or labor, as a principal serious concern or interest." In this sense it embraces everything about which one can be employed. It is often used in a much narrower sense to denote "that which occupies the time, attention, and labor of men for purpose of livelihood or profit." In this sense it signifies a calling for the purpose of a livelihood or profit. It is also used with various other shades of meaning, as with a special reference to mercantile or commercial activities, or to commercial or industrial enterprises, or as synonymous with trade. *Easterbrook v. Hebrew Ladies' Orphans' Society*, 85 Conn. 289, 82 Atl. 561 (1912).

A covenant restricting the uses to which a certain number of lots could be put, after enumerating a number of trades and businesses which should not be permitted thereon, concluded with the words "or any other trade or business dangerous or offensive to the neighboring inhabitants." It was held that the maintenance of a home for orphans and aged persons to be supported chiefly by charity but in part by payments by inmates, was not the conduct of a "business" within the meaning of such covenant, although the neighboring inhabitants might regard it as offensive. *Easterbrook v. Hebrew Ladies' Orphans' Society*, 85 Conn. 289, 82 Atl. 561 (1912).

In this case the court said: "It is apparent, from an examination of the instrument in its entirety, that the parties had it for their purpose to make the tract which they owned between them desirable and attractive for residences. It is equally obvious that it was intended that the instrument should embody all the measures which the parties regarded as necessary to effectuate the result sought to be secured. It is an exceptionally lengthy document, is drafted with uncommon precision, deals with a great variety of details, and unmistakably evinces unusual care and thought as respects both the matters to be provided for and regulated and the manner of that provision and regulation. It is impossible to read it and not come to the conclusion that it is the product of a thoughtful consideration of the situation and a solicitude to specifically and clearly embrace in its provisions all those regulations and restraints which at the time were deemed

needful to accomplish the end sought. It well may be that the foresight of these grantors nearly eighty years ago has not proved equal to the changed conditions of today, and that in the lapse of years it has developed that the provisions made in 1834 are inadequate to secure the results then sought after; but the restrictions of the instrument as they were made cannot be enlarged by implication or extended beyond their original intent in order that the general purposes of the covenanting parties may be effectuated under the new conditions. To make such extension would be to make a new contract for the parties in the place of the one they did make. Although the parties entertained the purpose of making the tract a desirable one for residential purposes, it is obvious that they did not contemplate measures which would compel it to be and remain an exclusive residential neighborhood. In other words, it was not regarded as a necessary condition to the accomplishment of the purpose in view that all trades and business should be barred. The ban was placed upon certain kinds of trades and business only. The provisions of the instrument which attempt a regulation of the uses to which the property might be put are few. They are confined to one that no building other than a two-story dwelling with or without wings should ever be erected on the front of twelve of the twenty lots, not including the defendant's, and those back of a fixed line, and the restriction now under consideration."

However, provisions of this kind, like all restrictive covenants, are to be construed with reference to the whole instrument, and the intention of the parties given effect. Thus, the owner of land was restricted in the use thereof by a covenant not to use or suffer to be used any building which might be erected on any part of the said lot of land as a hotel, tavern, public house, beer house, shop, warehouse, or manufacturing dye house, chandler's shop, or other place of business. He erected stables thereon which he intended to use for horses employed in his business as a retail coal merchant. The court granted an interim injunction against him in the terms of the covenant, because it thought the object of the covenant was to protect a residential estate from being used for the purposes of business. *White v. Pollard*, 52 Sol. Jo. 748 (1908).

§ 157. — need not be conducted for profit.

To constitute a "business" it is not essential that there should be payment, and payment under certain circumstances does not necessarily make that a business which would otherwise not be such. An occupation may be a business although profits are not attempted to be made, and are not in fact made, and no charges be made for the services or other thing furnished. It may be a charitable institution. *Bramwell v. Lacy*, 10 Ch. Div. 691, 48 L. J. Ch. 339, 40 L. T. Rep. 361, 27 Wkly. Rep. 463 (1879).

It has been held that the object of a covenant in a lease of a dwelling house not to use the same or exercise or carry on there any "trade or business," is that the house shall be used as a private dwelling house only, although the latter words are not expressly contained in the covenant, and that such a covenant is broken by carrying on a "home for working girls," where the inmates receive board and lodging, either with or without pay, although such institution is conducted without profit. *Rolls v. Miller*, 27 Ch. Div. 71, 53 L. J. Ch. 682, 50 L. T. Rep. 597, 32 Wkly. Rep. 806 (1884).

In this case it was said by the court: "Receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit—whether profit is actually obtained or not, must, of course, be immaterial—is certainly material in considering whether what was being done is or is not, a business, yet, in my opinion, it is not essential that there should be payment in order to constitute a business. And the mere fact that there is payment under certain circumstances, does not necessarily make a thing a business, which if there was no payment would not be a business. In my opinion, in the present state of things, what is now intended to be done does not put the matter in a different position from that in which it stood when the defendant received payment, because that payment was not a payment in the ordinary way for the purpose of getting profit if they could—it was not to constitute this a business for the purpose of profit—but it was simply a payment to go towards the charity in order to aid the funds of the charity. . . . It has been urged upon us very strongly that this is no business

at all, but a charity; that the defendants in making a home for these girls, are treating them simply as guests, and that receiving any number of guests or any number of friends into a house cannot be said to be carrying on a business in that house. I quite agree that bringing guests into, or having any number of guests or friends in, your house is not in any way carrying on a business. But what is done here? None of the defendants are residing in the house, nor are they receiving into their house as guests or friends these girls who make their home there. The defendants have a paid superintendent who manages the house for them, and it is the duty of that paid superintendent to manage the house, and to see that the girls who are there conduct themselves properly and in accordance with the rules and regulations of the charity, and the provision is made as to the way in which they are to be accommodated. It is not that any particular individuals known to the defendants, or whom they treat as their friends are admitted, but that all the public who are objects of this charity, on submitting to these regulations, are admitted into the house which they occupy. It might well be that the defendants if they liked to do this in a house which they occupied might do so, but when they do so in a house in which they pay a superintendent in order to receive the girls, these girls are really lodgers. They lodge there, and, although the trustees are, with a most praiseworthy object, using this lodging house for the purpose of charity, nevertheless, in my opinion, although the lodging is given gratuitously, what is being done must be considered as carrying on the business of a lodging house."

§ 158. Carrying on business.—Things incident to use of dwelling.

Those things which are done within a territory restricted against the carrying on of any business, to promote the general purpose of making the territory in question a desirable residential district, such as furnishing light, water and street railway transportation, and the delivery of groceries and other necessities of life to the residents, are not violative of such covenant. *DeLima v. Mitchell*, 49 N. Y. Misc. 171, 98 N. Y.

Supp. 811 (1906). In a sense, the delivery of groceries to a residence, or the furnishing of telephone service, or electric service, constitutes the carrying on of business, but such things are essential to the use of such premises solely for residence purposes, and are clearly not in violation of the intention of the parties to a restriction against the carrying on of business generally within the restricted territory.

§ 159. Carrying on business.—Billboards.

The erection of billboards by an advertising company on a vacant lot, for which a fixed rental is paid the owner, followed by the sale or letting of space on the boards for hire, has been held to be carrying on business on the land and using it for business purposes, within the meaning of a building restriction prohibiting the use of the land for business. *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911); *Nussey v. Provincial Bill Posting Co.*, 25 T. L. Rep. 489, (1909) 1 Ch. 734, 100 L. T. Rep. 687, 78 L. J. Ch. 539, 53 Sol. Jo. 418, 2 B. R. C. 425.

The letting of the gable ends of a house to a bill posting firm and the displaying by the firm of large advertisements thereon, was held to constitute a violation of a covenant on the part of a lessee not to use, exercise, or carry on, or permit to be used, exercised, or carried on upon the demised premises, or any part thereof, any trade or business whatsoever, but to keep the demised house as and for a private dwelling house. *Tubbs v. Esser*, 26 T. L. Rep. 145 (1909).

§ 160. Carrying on business.—Letting rooms to lodgers.

A lodger is one who has the right to inhabit another man's house. One who lives in a hired room or rooms in the house of another. The distinction between lodgers and tenants may, in some cases, be thoroughly drawn, and may depend upon the character of the hiring, with reference sometimes to the business of the lessor and the presumed intention of the parties, as gathered from all the other surrounding circumstances of the particular case. The tenant is put into the exclusive possession of his rooms, while the boarder or lodger has merely the use of them without the actual or exclusive possession, which is in the lessor subject to such use. *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576 (1900).

Where premises were leased to be used for private dwelling or residence purposes, it was held that the letting of rooms to lodgers was a violation of such restriction and in reality constituted a business. *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576 (1900).

§ 161. Business.—Boys' school.

In *Doe v. Keeling*, 1 Maule & S. 95, 14 Rev. Rep. 405 (1813), it was held that the carrying on of a boys' school constituted a business, within the meaning of a covenant in which the lessee agreed "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever." Here the court said: "But a business of this kind would necessarily produce inconvenience to the neighborhood, both by the disturbance which the inmates of the house would create, and by drawing to the spot a large resort of persons, such as the parents and the friends of the children; and it is, therefore, that species of business which would have most prominently offered itself as fit to be excluded. It is certain that the words of the covenant in some places relate to that species of trade which is carried on by means of sale and by an open exhibition of trade; but can we say that the word 'business' does not comprise such an occupation as the present? It seems to me that we cannot; and as the intention, if the party had it in his contemplation either to secure his own privacy or that of the neighborhood, there can be no doubt that this is a species of business that he would have particularly excluded. He has not done so by express words; but still the words are sufficient, and the intention is clear."

§ 162. Public business.—Girls' school.

A lease contained a covenant that the demised premises should not be used by the lessee or his assigns for the carrying on of any public trade or business whatsoever, and that the premises should be occupied and used as a private dwelling house only. It was held that the use of the house as a day school for girls for music and dancing, and the display of a brass plate on the front gate with the words "Ladies' School,"

and the circulation of a placard announcing that the lessee's academy was open at the premises for the practice of dancing for two evenings in the week, constituted a breach of the covenant. *Wickenden v. Webster*, 6 El. & Bl. 387, 2 Jur. 590, 25 L. J. Q. B. 264, 4 Wkly. Rep. 562 (1856).

In this case the court said: "The covenant is that no public business shall be carried on upon the premises, but that they shall be used as a private dwelling house only. Was the carrying on of this school a public business within the meaning of the covenant? It appears to me that it was. No distinction appears to be maintainable between a day school and a boarding school, however extensive. It is a school in either case; and there can be no doubt that the underlessees took as many eligible pupils as they could get. There was also exhibited a public placard, announcing that there would be a select class, not merely private instruction. It seems to me that it was intended, by this advertisement, to carry on the concern on a somewhat extensive scale."

§ 163. Business.—Hospital.

A covenant in a lease provided that the demised premises should not be used for the carrying on of any trade, business, or dealing whatsoever, or anything in the nature thereof. It was held that this covenant was violated by the use of the house as a hospital for out-patients suffering from diseases of the throat and chest. *Bramwell v. Lacy*, 10 Ch. Div. 691, 48 L. J. Ch. 339, 40 L. T. Rep. 361, 27 Wkly. Rep. 463 (1879).

On this question the court said: "Defendants have converted this house, which is in a residential neighborhood, into a hospital. It appears to be frequented by numerous patients, who are treated and supplied with drugs by the medical officer in attendance, and it also appears that a large number of them pay for this treatment. The payment, however, is a very moderate one, and there is no pretense for saying, nor is it alleged, that a hospital is carried on for any pecuniary profit, but the hospital authorities very properly require those patients to pay who can afford to do so. The neighbors, however, complain of the hospital, and say it is a nuisance, and also a source of danger to the health of the neighborhood.

Now it is well known that there are some throat diseases of an infectious character, and moreover, it is possible that a patient suffering from an infectious or contagious malady might go to the hospital, thinking that he had only an ordinary throat disease. Now has there been any breach of the covenant? First, then, is this a 'business' or 'in the nature of a business?' I have no doubt it is. It is in reality an apothecary's business. The question whether or not it is carried on for a profit is, in my opinion, immaterial. Even if it is not strictly a business, it is, at all events, in the nature of a business; but I am distinctly of opinion that this is a business within the meaning of the covenant. Next, is it within the second part of the covenant, the terms of which are very comprehensive? On this point I think the plaintiff's evidence is conclusive. It appears to me that it is quite sufficient to show that persons in the neighborhood have already suffered annoyance, inconvenience, and injury, and that the possible danger from infection is one they have full right to complain of. I am of opinion, therefore, that there has been a breach of the covenant, and that the plaintiffs are entitled to an injunction."

§ 164. Business.—Physician's office.

A restriction providing that the land conveyed should not be "used or occupied for trade or business of any kind whatever," was held to be violated by a physician who erected a house thereon, set apart a room as an office for receiving patients, provided certain hours of each day in which they should call upon him, and displayed his professional card upon the door. *Semple v. Schwarz*, 130 Mo. App. 65, 109 S. W. 633 (1908).

"Strictly speaking," said the court, "Dr. Schwarz was engaged, at his residence, in the practice of his profession as a physician, in the discharge of his professional obligations to those who called upon him for medical advice or treatment. In a narrow or restricted sense of the term, he was perhaps not engaged in business. But the definition of the term given by the lexicographers and sanctioned by the courts is broad enough to comprehend any employment, vocation or calling in

which one may engage for a livelihood or profit, and hence broad enough to take in the practice of physic, law or divinity. Whether or not Dr. Schwarz violated covenants must be ascertained by the proper construction of the following clause in the covenants, to-wit, 'nor shall said lot or any part thereof ever be used or occupied for trade or business of any kind whatever.' The covenantor evidently, from the very language used, intended to exclude from the lot all and every kind of business and every occupation or calling which can, within the broadest definition of the term, be classed as business. Any other construction of this clause of the covenant, it seems to us, would do violence to its language and tend to defeat its evident purpose. This view is strengthened by a consideration of the object and purpose of this and the other restrictions and covenants which were to make 'Fullerton's Westminster Place' a strictly exclusive residence place and we are bound to conclude that Dr. Schwarz's evidence shows he breached the covenant prohibiting the occupation of lot number 18 for business purposes."

However, in the case just discussed, the court refused to go to the extent of prohibiting the physician from advertising his residence in the telephone book, or from receiving patients at his residence when they should come to see him, or from setting apart a room in which to receive such patients. It was held that the restriction in question simply prohibited him from maintaining an office and from advertising in any manner that he would receive patients there.

In this respect the court said: "But we do not think the evidence warrants the court to enjoin Dr. Schwarz from receiving patients at his residence at all, or that the court shall say that he shall not set aside a special room in his residence where patients may be received if they must call. It would be ridiculous and inhuman to hold that no patients should be admitted to Dr. Schwarz's residence under any circumstances whatever, or to hold that he cannot set apart a room for the purpose of seeing such persons as must of necessity call at his residence for the purpose of consulting him professionally, or such as may be taken there for emergency treatment. The fact that Dr. Schwarz and his wife have set apart a room in

their residence for the express purpose of receiving patients, and that he has let his patients know that they may call upon him there professionally between two and four o'clock p. m., of each week day, and the fact he has advertised this particular room as his office by tacking his professional card on the door, constitutes the business he is conducting at his residence in violation of the covenant. . . . We also think that Dr. Schwarz should not be prohibited from advertising his place of residence in the telephone books; to do so would prohibit him and his patients the use of this most convenient means of communication with each other. . . . The doctor may and should oppose and discourage such calls, but what is he to do when a call is made? He should not drive a sick person, who calls on him for relief from pain and suffering, from his door, and if he administers to him instead of ordering him off, he should not be charged with keeping an office and doing business at his residence, in violation of the covenant."

§ 165. Business.—Hotel.

A restriction prohibiting the conduct of any "business" on the premises conveyed has been held to include the building of a hotel. *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808 (1913).

§ 166. Trade or business.—Temporary private railroad.

A restrictive covenant on the part of a grantee provided that he "will not carry on or permit to be carried on upon said premises any noxious, offensive or dangerous trade or business." It was held that such covenant was not violated by the maintenance, probably for five years, of a temporary steam railroad, for dumping matter excavated by the owner as a city contractor for a reservoir, which caused the building of the neighboring grantee to vibrate and compelled him to close his doors and windows in warm weather to keep out smoke and cinders, as the operation of the railroad was held not to be the carrying on of a "trade or business." *Bohnsack v. McDonald*, 26 N. Y. Misc. 493, 56 N. Y. Supp. 347 (1899).

Here the court said: "I do not think the restrictive covenant is broad enough to prohibit the premises as a way over

which to pass and repass. The language of the covenant indicates that it was the intent of the grantor to prohibit the establishment on the premises to be thereon conducted and carried on which would be noxious, offensive, or dangerous to other grantees in that vicinity. The meaning of the word 'business' while very broad and comprehensive in its general sense, must be limited when used in connection with the word 'trade.' It appears from the evidence that this is the residential portion of the city. All of the buildings in that vicinity are in the main small residences. There are also many vacant lots interspersed among them. It was probably the design of the grantor to prevent the location on any of these lands of any trade or business that would be noxious or offensive to the residents of that locality. It was not intended by the covenant to prevent owners of vacant lots from passing and repassing over them in connection with a trade or business operated or carried on elsewhere. If the manner of passing and repassing by the owner over his land constituted a nuisance, those injured thereby would have an ample remedy independent of the covenant. It was not the design of the covenant to protect the plaintiff from every form of nuisance, but only from the establishment of a trade or business to be conducted on the land which would be offensive, noxious or dangerous. Plaintiff, therefore, cannot maintain this action by reason of the restrictive covenant in the deeds, for no violation thereof is shown."

§ 167. Trade or business.—Letting suites in dwelling house.

The letting of a three-suite dwelling to three different families for use for residential purposes, is not for the purpose of a business or trade, and is not carrying on a trade. *Re Robertson*, 25 Ont. L. Rep. 286, 20 Ont. Wkly. Rep. 712 (1911).

§ 168. Dangerous trade or business.—Resin oil and paraffine manufactory.

A covenant provided against the erection or permitting, upon the premises granted, of any brewery, distillery, slaughter house, or "other noxious or dangerous trade or

business." Defendants erected a manufactory for the distillation of resin oil, and one for the production of paraffine. Held, that the buildings fell within the prohibition against "other dangerous trade or business." *Atlantic Dock Co. v. Leavitt*, 50 Barb. (N. Y.) 135 (1867).

"The obvious meaning of this language," said the court, "is a prohibition of any business which is as dangerous as that of a distillery. The evidence leaves no room for doubt upon this subject. The chief danger attending the distillation of alcohol arises from the excessive heat employed in the process, whereby the exposure of property to conflagration is increased. Such danger, in an equal degree, attends the business carried on by the defendants. It is therefore 'dangerous' within the meaning of the covenant."

§ 169. Commercial purposes.—Cutting timber for wood pulp.

The owner of forest lands conveyed a portion thereof and in the deed covenanted in regard to the lands retained by him that no portion thereof "shall be used or sold for commercial-agricultural, manufacturing or other purposes, but the same shall by the parties of the first part, their heirs and assigns, be used and sold exclusively for permanent forestry, hotel, camp and cottage purposes," and that all deeds given by him should contain a clause binding the purchaser thereof, his heirs and assigns, to a perpetual use of said lands for permanent forestry, hotel, camp and cottage purposes. It was held that the act of the owner in allowing third persons to cut timber on the land to be used in the manufacture of wood pulp constituted a violation of the covenant, as the word "commercial" did not apply solely to agricultural uses, but to manufacturing or other commercial use as well. *People v. Thistlewaite*, 134 N. Y. App. Div. 876, 119 N. Y. Supp. 690 (1909).

In this regard the court said: "Having in view the situation of the lands sold to the plaintiff, as well as those in regard to which the covenants were made, the purpose or object sought to be accomplished, and in order to give substantial effect to all the language used, the term 'commercial' should

be construed to apply not only to agricultural, but also to 'manufacturing or other purposes.' This would operate to exclude all commercial uses or sales, and that, I think, was the intention of the parties."

§ 170. Mercantile purposes.—Lying-in hospital.

A restriction providing that no building on the premises "shall be used for any manufacturing, mercantile or mechanical purposes," has been held not to be violated by the conduct of a private hospital for surgical and medical cases and as a lying-in hospital under a proper license, intended principally for the treatment of cases sent there by other physicians. *Carr v. Riley*, 198 Mass. 70, 84 N. E. 426 (1908).

§ 171. "Occupation."—Hospital.

A covenant was not to "use the premises hereby demised, or any part thereof, or permit the same or any part thereof to be used in the exercise or carrying on of any art, trade or business, occupation or calling whatsoever." It was held that such covenant was violated by the use of the house for the purposes of a hospital association, established, without a view to profit, to care for patients able and willing to pay for it. *Portman v. Home Hospitals Assn.*, L. R. 27 Ch. Div. 81, 50 L. T. Rep. 599 (1879).

In this case the court said: "When you come to look at the meaning of the word 'occupation,' it is such an occupation that you can use a house for it; that is, something done in the course of the use of the house which shows that it is used for that occupation. It would be very ridiculous to say that opening a bookseller's shop by a man is the using of a house within the meaning of the words 'exercise or carry on any art, trade or business, occupation or calling whatsoever,' and at the same time to say that the identical user, in every respect, except that a man does it from benevolence or charitable motives, is not to be so treated. I will give another illustration; I will go back to the physician and consulting room. The physician who used the consulting room for the purposes of seeing his patients there is clearly using it for the purposes of his occupation or art. Suppose that, instead of seeing his

patients at his own rooms, he is a physician to a public dispensary, or the physician in charge of the out-patients in one of our large hospitals. He then goes, not to his own consulting rooms, but to the room of the dispensary or hospital. Does not he use that room for the purpose of his occupation? And suppose he has no other practice—some of them have no other practice—for what purpose does he use the consulting room of the hospital? Surely, in the exercise of his occupation or calling, his calling being that of a physician. It cannot make any difference that he gets no fees; that he does not get paid, and does not attempt to get paid. He still used that room for the purpose of his calling or occupation, and really, when one thinks of it, it is far better to look at the ordinary meaning of the words and see whether they apply to this case, than to attempt to lay down some definition which may err on one side or the other.” In speaking of the occupation of the defendant, and after reciting the purpose of the same, that is, its occupation, the court continued: “It is open, in fact, to the whole public who can afford to pay those sums. That is the occupation of the association. I suppose I cannot understand any meaning of the word ‘occupation’ which would not describe this as being such occupation. Are the defendants going to use the house for that purpose? They are there for no other purpose whatsoever. How can I properly be called upon to say that they are not going to use the house in the exercise or carrying on of any occupation or calling whatsoever. If this is not their occupation they have none at all, and then, of course, is not a position in which I could place the association. It seems to me to be perfectly plain that the keeping of a hospital by a hospital association, and the user of the house, for the purpose of keeping that hospital, is a user for the purpose of that occupation, and a breach of the covenant.”

§ 171. “Calling.”—Girls’ school.

In the conveyance of a house it was provided that the purchaser should not carry on any trade, business or “calling” in the said house, or permit the same to be used to the annoyance, nuisance, or injury of any of the houses in Kemp Town,

where the premises were situated. It was held that the keeping of a girls' school on the premises was a breach of the covenant. *Kemp v. Sober*, 1 Simp. (N. S.) 517, 15 Jur. (O. S.) 458, 20 L. J. Ch. 602 (1850).

The court declared that it had very little doubt that keeping a school is carrying on a calling, and referred to another case decided in the court of kings bench in which it was so held in case of a boys' school. The vice chancellor stated that he could not fix any rule that the carrying on a boys' school is a calling, and the carrying on of a girls' school is not.

§ 172. Annoyance to neighboring inhabitants.—Hospital.

A lease of a dwelling house contained a covenant against the carrying on of certain specified trades and against the doing of any act which should, might be, or grow to the annoyance, nuisance, grievance, or damage to the lessor, his heirs or assigns, or the inhabitants of the neighboring or adjoining houses. It was held that the establishment of a hospital in the house for the treatment of outdoor patients suffering from diseases of the throat, nose, ear, skin, eye, fistula, and diseases of the rectum, constituted a breach of the covenant as the plaintiff had a reasonable apprehension of risk of infection which constituted an "annoyance" within the covenant, and it was not necessary that they should prove pecuniary damage. It was also held that the covenant would have been broken by anything which would constitute an annoyance to the inhabitants of the neighboring or adjoining houses which were not on the lessor's estate. *Tod-Heatley v. Benham*, L. R. 40 Ch. 80, 60 L. T. Rep. 241, 58 L. J. Ch. 83, 37 Wkly. Rep. 38 (1889).

In this regard the court said: "It has been contended that nothing can come within the words 'annoyance or grievance,' unless it involves a money loss which has been proved and shown on the part of the plaintiff. I must express my dissent from that. The damage may require in some degree to be measured by the pecuniary loss, but 'annoyance or grievance' are words added, not simply with reference to nuisance or damage, and in my opinion many things may be within the meaning of this clause and an annoyance or grievance to the

owner of this property, or the inhabitants of the neighboring or adjoining houses, although no pecuniary loss can be shown as resulting from the acts complained of. . . . Now 'annoyance or grievance' are words which have no definite legal meaning, but we must consider what they mean. It has been thrust upon us that we cannot say that the meaning was that which was an annoyance or grievance to reasonable people, because the judges in speaking of what should be an annoyance to reasonable people are only speaking of that which they themselves really think would be an annoyance or grievance. That is the difficulty that judges very often have to deal with, and they must not take that as an annoyance or grievance which would be only to some sensitive persons an annoyance or grievance. They must not decide upon what their individual thoughts are, but upon what in their opinion, and upon the evidence before them, would be an annoyance or grievance to reasonable sensible people. I think an act which is an interference with the pleasurable enjoyment in reason of a house is an annoyance or grievance. It is not sufficient, in order to bring the case within the words, that the plaintiff should show that any particular man may object to it, but we must be satisfied by argument, and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done there. It is not necessary, in order to show that there has been reasonable ground for annoyance or grievance, to show that in fact there is danger or risk of infection. A reasonable apprehension of nuisance from acts done by the defendants will produce such interference with the pleasurable and reasonable enjoyment of the adjoining houses as to come within the words 'annoyance and grievance'—not that any particular person is annoyed or aggrieved, but that there is annoyance or grievance to persons who entertain reasonable views. . . . In my opinion, having regard to the evidence of the doctors on both sides, it cannot be said that the apprehension of risk from this hospital being carried on there, in the way that it is carried on, is unreasonable."

§ 173. Forge for manufacturing iron.—Forge for heating iron.

A restrictive covenant prohibiting the erection of a forge or furnace for the manufacturing of iron, or the erection of any building for any such purpose, is not violated by the erection of buildings in which forges for the purpose of heating iron, and moulding and working it into different articles to be used in the construction of locomotives. This because a forge or furnace for the manufacture of iron has a definition comprehended and understood by those acquainted with the business. *Rogers v. Danforth*, 9 N. J. Eq. 289 (1853).

Regarding this question the court said: "What is the definition of a forge or furnace for the manufacturing of iron? For, if there is a definition comprehended and understood, alike by scientific men and by mechanics acquainted with the business referred to, such definition ought to control the court in its construction of this covenant. What is such a forge or furnace? An establishment, or mechanical contrivance, by which iron is made, or manufactured from the ore. A forge manufactures, or makes malleable iron direct from the ore. A blast furnace makes cast iron direct from the ore. From what is iron manufactured? It is manufactured from the ore. By a blacksmith's forge iron is not manufactured. But, by it, from iron itself, machines or instruments of use, are manufactured. It is not the intention of the defendants to erect any forge or furnace for the manufacture of iron. Their object and intention is not to make iron, but to use iron when made, to be worked up into different materials."

§ 174. Brew house which would annoy neighbors.—Small-pox hospital.

A covenant against the use of premises for a brew house which would annoy the neighborhood, does not extend to any other business or occupation although the same might be an annoyance to the neighborhood. It is confined to the business of a brew house, and further, to a brew house which would be an annoyance to the neighborhood. The establishment and

operation of a smallpox hospital is not a violation of such a covenant. *Baines v. Baker*, 1 Ambl. 158, 3 Atk. 750 (1752).

§ 175. "Bakery."—Bake ovens.

A restrictive covenant prohibiting the carrying on of certain trades and the erection of certain buildings, including a "bakery," or the carrying on of any business that may in any wise be "dangerous, noxious or offensive to the neighboring inhabitants," is violated by the installation of two bake ovens projecting from the rear of a house into the yard and intended to be used in connection with a bakery. *Simons v. Mutual Construction Co.*, 132 N. Y. App. Div. 719, 117 N. Y. Supp. 567 (1909).

§ 176. Distillery.—Distillation of paraffine oil.

A covenant provided that no brewery, distillery, or slaughter house, or "other noxious or dangerous trade or business," should be erected or permitted on the premises. Defendants had erected a manufactory for the distillation of resin oil, and also a manufactory for the production of paraffine; the buildings and machinery being like those usually employed in the distillation of alcohol, and such distillation might be accomplished by means thereof. Held, that the defendants were disabled from erecting or maintaining such buildings or machinery; that it was not necessary, in covenant, to prove an actual use of such buildings and machinery for the purpose of a distillery; it being enough that they may be so used, and that a breach is committed before an actual use. *Atlantic Dock Co. v. Leavitt*, 50 Barb. (N. Y.) 135 (1867).

In a later case in New York involving similar facts it was held that a factory for the distillation of paraffine oil is not a "distillery" within the meaning of a restriction against the erection or maintenance of a distillery. *Atlantic Dock Co. v. Libby*, 45 N. Y. 499 (1871).

In the case last cited the court said: "Words are to be given the signification which the parties intended, and we are to presume that signification was intended which is generally understood and in general use. The definition of a distillery within this rule is a place or building where alcoholic liquors

are distilled or manufactured, and not every building where the process of distillation is used.”

§ 177. Charge only an entrance fee.—Charge for roller skates.

The grantors of part of a shore front reserved the right to build a pier thereon and covenanted that they should “be confined to charging only an entrance fee.” Thereafter they constructed the pier and charged an entrance fee thereto of ten cents, which admitted visitors to all portions of the pier, but in addition thereto they rented roller skates to persons desiring to skate on the rink and charged an additional sum therefor, and also for checking garments. Held, that these additional charges were in violation of the covenant. *Atlantic City v. Associated Realties Corp.*, 73 N. J. Eq. 721, 70 Atl. 345 (1908), reversing 72 N. J. Eq. 634, 67 Atl. 937 (1907).

On this question the court said: “The main question is whether, assuming that the agreement is valid, the defendant has violated its terms by its charge for the hire and use of roller skates and the checking of garments. We think that this charge is in violation of the covenant. The easement deed must be construed so as to effectuate, if possible, the intention of the parties, and to fulfill the common purpose of the grantors, unless inconsistent with settled rules of law. The covenants therein contained show that the owners of the beach front lands were actuated by a common purpose to carry into effect by their joint action a general plan of mutual benefit to themselves and to the public to preserve an open view oceanward from the elevated public walk, and to that end to restrict the use of the land, and the business to be conducted, on the ocean side of the walk. The language of the covenant that the pier owners ‘shall not permit the sale of any commodity upon the same, and be confined to charging only an entrance fee,’ seems plainly to admit of but one construction, namely, that no pecuniary exaction beyond a fee for entrance to the pier is allowable. Of course, fees charged a visitor, after entering the pier, in addition to a fee paid for entrance to the pier, are not entrance fees, and such charges,

not being entrance fees, are in violation of the literal words of the covenant."

§ 178. Against letting or establishing mill site.

A covenant on the part of the lessor of a mill site on a stream that he would not let or establish any other place or site on the same stream to be used for sawing mahogany, is violated by a subsequent demise by the lessor to third persons of a mill site on the same stream without limitation or restriction as to its use, and the establishment and use of a mill for sawing mahogany by the lessees. *Norman v. Wells*, 17 Wend. (N. Y.) 136 (1837).

§ 179. Against opening mining shaft on land part of which subsequently purchased by covenantor.

The owners of a tract of land conveyed the same to an improvement company, reserving the mineral right to themselves, "with the sole right and privilege to mine and remove the same by any subterranean process incident to the business of mining, provided, that no mine or air shaft shall be intentionally opened or any mining fixtures established on the surface of said land." The grantors knew that the purpose of the grantee was to subdivide, improve and sell the property as city lots. Subsequently a mining company purchased the mining right so reserved, bought several of the surface lots, and were proceeding to sink a shaft and establish mining fixtures on the lots. Such operation proved to be an annoyance to the owners of the other lots. Held, that equity would enjoin the mining company from conducting such business on the lots purchased by it, as the proviso in the deed was intended to operate in the nature of a covenant running with the land, prohibiting the grantors, their heirs and assigns, from opening any mine or air shaft or establishing on the surface of the land in question any mining fixtures, whether owned by the mining company or by others. *Electric City Land & Imp. Co. v. West Ridge Coal Co.*, 187 Pa. St. 500, 41 Atl. 458 (1898).

In the construction of these provisions it was said by the court: "In this case the manifest intention of the parties

was, in the first place, to except from the grant, and reserve to the grantors, their heirs and assigns, all the coal and minerals beneath the surface of the land described in the deed, with the right to mine and remove the same by any subterranean process, etc. This was done in language that is not susceptible of any doubt. In the second place, it is equally clear that it was their further intention and agreement that in the exercise of the mining right and privileges thus excepted and reserved, the grantors, their heirs and assigns, owners of the coal and mineral, would not intentionally open any mine or air shaft or establish any mining fixtures on the surface of the land; and as expressive of that mutual agreement the proviso was added, and, in effect, the grantors thereby covenanted for themselves, their heirs and assigns, that neither they nor either of them would open any 'mine or air shaft' or establish 'any mining fixtures' on the surface of the land. The restriction thus placed on the mining right and privileges was as permanent and enduring as the rights themselves. It was evidently imposed, not for the benefit of the five lots which the defendant company afterwards purchased, nor for the benefit of any particular part of the surface, but for the benefit of the entire tract, and the owners of each and every lot therein. If the defendant company, instead of purchasing the five lots only, had acquired title to all lots into which the one hundred acre tract was subdivided, and thus united in itself the title to the entire surface and the coal underneath the same, together with the mining rights pertaining thereto, there would be some force in the learned judge's legal conclusion that 'when the owner of the coal became also the owner of the surface the effect of the proviso was destroyed.' It was never intended by the parties that the purchase of a few of the surface lots by the owner of the coal and minerals should in any manner impair the force and effect of the proviso, much less 'destroy' the same."

§ 180. Rights of user that pass as appurtenant to a grant or lease.

In general the grant of a thing passes the incident as well as the principal, though the latter only is mentioned, unless

there appears an express reservation. Thus, the lease of a building passes everything belonging to it or which is essential to its enjoyment. A lease of a ground floor abutting on a yard also belonging to the lessor and forming a part of the same tenement carries the right to have the windows looking on the yard remain unobstructed. The lease of a building for a store and dwelling carries with it the right to use it in the same manner and with the same beneficial rights as were then connected with its use and enjoyment. And where at the time of making such lease a passageway was used by the owner or previous tenant in connection with the premises, such right would pass to the lessee. *Vinissky v. Lazovsky*, 155 Ill. App. 596 (1910).

The term "appurtenances" used in a lease includes everything which is necessary and essential to the beneficial use and enjoyment of the thing leased or granted. *Greenblatt v. Zimmerman*, 132 N. Y. App. Div. 283, 117 N. Y. Supp. 18 (1909).

Plaintiff leased a store "to be occupied and used as a restaurant with the appurtenances," and continued to use part of the cellar for storing coal for use in connection with the restaurant business, and which was merely a continuation of the same use made by the lessor in the same business, prior to the making of the lease. The lessor interfered with such use of the cellar and the lessee filed suit for an injunction to restrain such interference. It was held that such use of the cellar was appurtenant to the business carried on, and that the lessee was entitled to an injunction. *Greenblatt v. Zimmerman*, 132 N. Y. App. Div. 283, 117 N. Y. Supp. 18 (1909).

In this case it was said by the court: "It was essential to the enjoyment of the lease that the tenant should have a convenient and suitable place for storing coal. It appears that the business required the consumption of about two tons of coal each month. It would be absolutely unreasonable to expect the tenant to store the coal in the restaurant or in the yard or to buy it daily by the sack at a much higher rate than by the ton. It was evidently contemplated that he should store it where it had been stored, and he was entitled to an injunction to prevent his landlord from interfering with and trespassing upon his rights."

§ 181. Detrimental to use for dwelling houses.—Storage house.

In furtherance of a general scheme the owner of a number of lots fronting on the same street conveyed them subject to restrictive covenants providing that no building "shall ever be erected within fifteen feet of" the street line "and no mechanical shop, livery stable, or store shall ever be erected or used on said parcel which shall be detrimental to the use of this locality for dwelling houses." Held, that it was not a violation of this covenant as a matter of law to erect on one of the lots a building other than a dwelling house and used as a place for the storage of merchandise not brought to or taken from the building over the street in question, and also for the storage of automobiles, but not used as a garage. *Noyes v. Cushing*, 209 Mass. 123, 95 N. E. 83 (1911).

In this case the court said: "The restrictions, while forbidding the use or erection of a building for a 'mechanical shop, livery stable, or store,' contain no express provision limiting the use of the lot to the erection of a building for a dwelling house. On the contrary, the implication from the provision that no building 'shall ever be erected or used on said premises which may be detrimental to the surrounding locality for dwelling houses' is that a building of a different character may be erected so long as it or the use to which it is put will not be detrimental to the use of the surrounding locality for dwelling houses. It was no doubt expected that the effect of the restrictions would be to impose upon the locality to which they applied a residential character. But in the absence of anything in them limiting buildings to be erected to dwelling houses, we do not see how the restrictions can be so construed. The question whether the erection of such a building as the defendants have erected and whether its use for the storage of hay, grain, flour and other merchandise which they deal in would be detrimental to the surrounding locality for dwelling houses is largely if not wholly one of fact. The presiding judge found apparently that the building and the use of it as contemplated would not be detrimental if the building was not to be used as a store, and goods and merchandise were not to be hauled through Creigh-

ton street to and from it. The evidence on the subject was contradictory, and it plainly cannot be said, we think, that this finding was wrong. We think, however, that the use of the building as a garage for the storage of automobiles would or might be detrimental to the use of the street for dwelling houses, and that the decree should be modified by striking out that part of it, with leave to apply to the superior court to have the decree to include a provision, if it sees fit, permitting the use of the warehouse for the storage of automobiles, but not as a garage. We think that it should also be modified so as to restrain and enjoin the defendants not only from using said building as a store for the sale of goods on Creighton street and from transporting merchandise to and from said building through Creighton street, but also from using said building as a store for the reception or delivery of goods sold or to be sold in the Regent street building, and from transporting goods and merchandise through Creighton street in connection with the Regent street store."

§ 182. Detrimental to use for dwellings.—Question of fact.

The question of whether the erection of buildings and the carrying on of certain business will be detrimental to the use of the surrounding locality for dwelling purposes, and therefore in violation of a restriction to that effect, is largely a question of fact. It is, at least, primarily one of fact. After the facts are found, it may follow as a matter of law that such uses would be detrimental to the surrounding locality for dwelling purposes. *Noyes v. Cushing*, 209 Mass. 123, 95 N. E. 83 (1911).

§ 183. Right to erect a "pier."

The state granted to complainant certain riparian lands in Atlantic City, and in the instrument transferring the title provided, with respect to the land under water lying between the exterior line for solid filling and the exterior line for piers as fixed by the state commissioners, that "said land is not to be used for any purpose whatsoever except for the erection of a pier or piers thereon, under which the tide may ebb and flow, and no solid filling shall be placed thereon." The com-

plainant deeded a portion of such lands to defendant, inserting a similar provision in the deed of conveyance. After acquiring the land defendant planned to erect a bath house on the pier or piers, which latter rested on the land in question. Complainant contended that such an act upon the part of defendant would constitute a violation of the restrictive covenant. In holding that the act of the defendant did not constitute a violation of the covenant, the court said: "I think it perfectly clear that the intention in fixing a line for solid filling, and, beyond that, an exterior line for piers, was to limit the distance into the water that solid structures interfering with navigation might go, beyond which only such structures in the water should be permitted as would not prevent navigation. The generic meaning of the word 'pier' is a support, and in its precise use the absence or presence of water surrounding it is immaterial. 'A pier' might rest upon solid ground, utterly without reference to the presence or absence of water. Its more customary use, however, is with respect to projections into water. It will be observed that the language is 'pier or piers,' and this connotes the presence of one or more of these supporting columns. What is supported on the columns does not change the name or character of the sub-structure. So long as the land between the line of solid filling and the exterior pier line has nothing erected on it excepting piers, I do not think that the covenant has been violated." *Chelsea Land & Imp. Co. v. Westcott*, 75 N. J. Eq. 367, 72 Atl. 1007 (1909).

§ 184. "Outward mark or show of business."—Signs.

The owner of business premises leased the same subject to a covenant on the part of the lessee not "to fix or permit any outward mark or show of business to be affixed" on the demised premises. The lessee sublet two of the rooms comprised in the agreement, and the right to use the entrance in common with the other occupiers of the house. This subtenant carried on the business of a tailor under a firm name, and she put up in the window of one of the rooms a wire blind which had inscribed on the side of it towards the street the name of her firm, and indicating that it was the successor

of another firm, whose name was given. She also put the name of her firm on a white roller blind at one of the windows, and also placed on the iron railings outside the entrance a brass plate with the name of her firm inscribed thereon, followed by the word "tailors." It was held that both the blinds and the brass plate constituted an "outward mark or show of business" within the meaning of the restrictive covenant. *Evans v. Davis*, L. R. 10 Ch. Div. 747 (1878).

Respecting this question the court said: "What are the words on the blind? They are 'H. Browne & Co., late Storey, Browne & Co. Entrance, 15 Clifford Street.' That appears to me to indicate to any reader that there is a firm of H. Browne & Co. constituted for the purpose of some business, and that the business which they carry on is the business which was formerly carried on by Storey, Browne & Co. We know that firms described in that manner are not, according to the ordinary course of things in this country, constituted except for the purpose of business. That appears to me, therefore, to be 'a mark or show of business' within the meaning of the covenant. Is it an 'outward mark or show of business'? It has been urged that, to bring it within the predicate 'outward,' there must be something 'materially external' placed outside the demised premises. I do not think that is the meaning of the word 'outward,' as here used. I think it refers to a 'mark or show of business,' which is directed, not to the inner portion of the property, not to a landing, lobby, or entrance hall inside the property, but which is intended to attract the attention of the outside passers-by. 'Outward' means here, according to my view, 'directed to the outside,' and to persons outside the premises. Then has this 'mark or show' been fixed on the premises? It seems to me that it has. The wire blinds were certainly fixed. It is not necessary to consider how far the fixing is of a permanent character. The object of the covenant renders the nature of the fixing immaterial. It seems to me, therefore, that the wire blind is within the words of the covenant. Is it within its spirit? I think it is. I think the object and intent of the covenant was that the premises, the house in question, should have the outward aspect of a private dwelling house. The same observa-

tions apply, with very little difference, to the white roller blind. There, 'H. Browne & Co.' are the only words descriptive of the firm, and they appear to me to import that there is a firm carrying on business, and as such to be a show or mark of business, and an 'outward' show or mark, just as the wire blind. The matter appears still more plain with regard to the brass plate, because, not only is it physically external to the building, but fixed only on some iron railings by the entrance door, but it has the description of the business of H. Browne & Co., as 'tailors,' upon it."

§ 185. Against nuisances.—Must be nuisance in law.

In a case in which the covenant involved provided against the use of premises for any purposes which would constitute a nuisance to the neighboring inhabitants or occupiers of adjoining premises, it was said that unless the nuisance complained of is one for which an indictment could be maintained, it is no nuisance within the terms of the covenant. *Harrison v. Good*, L. R. 11 Eq. 338, 24 L. T. Rep. 263, 40 L. J. Ch. 294, 19 Wkly. Rep. 346 (1871).

A grant of land on condition that the grantee, his heirs or assigns, shall not erect, place or permit on the premises granted any building or business which shall or may cause or become a nuisance to owners of contiguous lands, does not bind the owner to any greater extent than he would be bound by law in the absence of the covenant. *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013 (1890).

§ 186. Words "other nuisances," following specific enumeration.

A restrictive covenant on the part of the grantor not to put upon the premises "any buildings, timbers, trees, or other nuisances," will not include excavations unless it appears from the whole instrument that such was the intention of the parties. The general words "other nuisances," include only things similar in character to those specifically named by the words preceding them. *Cross v. Frost*, 64 Vt. 179, 23 Atl. 916 (1891).

Referring to the restriction and this rule of construction,

the court said: "If this rule governs the construction of the clause quoted, the phrase 'other nuisances' cannot be made to include a lowering of the surface; for the things named are only such as are placed upon and raised above the surface. We think the scope of the phrase must be restricted in accordance with this rule, unless its use in a more comprehensive sense is apparent from the instrument as a whole."

§ 187. Nuisance.—National parochial school.

Land was sold in lots under a general scheme of improvement with covenants in the deeds that the vendees would not do or suffer to be done on the premises anything which might be or be deemed to be a nuisance to the vendor or any of his tenants, or the occupiers or proprietors for the time being of the adjoining property. It was held that the establishment and maintenance of a national parochial school would not constitute a violation of such restriction. *Harrison v. Good*, L. R. 11 Eq. 338, 24 L. T. Rep. 263, 40 L. J. Ch. 294, 19 Wkly. Rep. 346 (1871).

In respect of this question the court said: "An inconvenience, a loss to Mr. Dangerfield, unquestionably it is. All the hopes that he formed when he spent six thousand pounds in building his house will be disappointed. His residence will be made much less agreeable than it was; but I cannot enlarge the terms of the covenant to give him a right which has not been stipulated for. I am obliged, therefore, to dismiss the bill."

§ 188. Nuisance.—Public garage.

The operation of a public garage not being a nuisance *per se*, cannot be enjoined under a restrictive covenant prohibiting the use of the premises for any nuisance whatsoever. *Ronan v. Barr*, ... N. J. Eq. ..., 89 Atl. 282 (1913).

In this respect the court said: "The erection of a public garage *eo nomine* is not prohibited, but it is insisted that to permit one to be erected and operated would create a nuisance. To read this into the clause inhibiting nuisances necessarily requires a finding that a public garage is a nuisance *per se*. This it surely is not. It is a place for the housing of auto-

mobiles. The business is a lawful one, and the presumption is that it will be lawfully carried on. In such circumstances a court of equity will not interfere. If, in the prosecution of the business, a nuisance is created, it may interpose."

§ 189. Offensive to adjoining residents.—Wharf and railroad.

The owner of two building lots, bounding on a river, built a family residence on one for his own use. The other he sold to B for like purpose, the deed containing a restrictive covenant on the part of B that he would not use the lot in a way or for any business which might be in any manner offensive to the occupant of the adjoining property, or that would tend to deteriorate or lessen its value, and that he would not use it for a stone quarry. B leased the right to C to build a wharf on the river front, and to construct a railroad across the lot, for the purpose of transporting stone from a quarry and loading the same on vessels. Held, that the railway and wharf were prohibited by the covenant. It was also held that the wharf alone was violative of the covenant, because of its affording access, and attracting to shore, nocturnal debauchees rambling by water from a neighboring city. *Seymour v. McDonald*, 4 Sandf. Ch. (N. Y.) 502 (1847).

The court said, in part: "It is scarcely possible that the congregation of men and animals, and the dust and noise, which such a business will necessarily produce, will be inoffensive to the occupants of the adjacent cottage. Whether they ought to object is not the question. It suffices that the complainant, owning both lots, and designing one for a retired country residence, refused to sell the other, except with such a prohibition. Again, it is abundantly shown, that the erection of the dock will lead to consequences still more offensive to quiet and orderly people, who may reside in the complainant's cottage, and which may well be classed as a nuisance. It is said the natural bank of the East river affords equal, and even greater facilities for the landing of nocturnal debauchees on these lots, than will be afforded by a wharf. But the bank does not invite such landing, and the experience of the neighbors shows, that the wharves are chiefly used,

either as enabling those parties to make their boats fast, or as presenting a point of attraction, and holding out inducements for them to go ashore. And the erection of a wharf, or anything else, which, of itself innocent, invites nuisance or grossly offensive practices, and from its propinquity to the city will inevitably lead to such practices, is in my view, clearly within the prohibitions of the conveyance."

§ 190. Offensive trade.—Lunatic asylum.

A covenant in a lease provided that the premises should not be used for certain specified trades and businesses, and concluded with the words "or any offensive trade." It was held that the use of the premises as a lunatic asylum came within the prohibitive provisions of the covenant. In this respect the court said: "The next covenant, which relates to carrying on any offensive trade, is very clumsily and inartificially worded. It is, that particular businesses and trades enumerated shall not be carried on, and that the inhabitant shall not carry on 'any offensive trade.' The question is, whether, as the business carried on here is not among those enumerated, it comes within the term 'offensive trade'! And, upon this point, I think, notwithstanding the word 'business' is omitted after the words offensive trade, that this is within the meaning of the covenant; because we must look at the object of the covenant, which is not to prevent such tradings as are within the meaning of the bankrupt laws, but to prevent such things as are likely to be an annoyance." *Doe v. Bird*, 6 Car. & P. 195, 4 Nev. & M. 285, 4 L. J. K. B. 52 (1833).

§ 191. Offensive purpose or occupation.—Garage.

Whether or not a business is offensive to neighboring inhabitants must be determined from its effect upon the normal and rational man. If it is such as would only annoy and disturb a supersensitive or highly nervous person it would be unfair to hold that the business or occupation falls within the meaning of such a description. On the other hand it would be equally unfair to hold that such a description is applicable to business which would annoy and disturb persons

accustomed to such annoyances. *Hibberd v. Edwards*, 235 Pa. St. 454, 84 Atl. 437 (1912).

A restriction forbidding the erection upon the land in question of "any tavern, drinking saloon, steam mill, tannery, slaughter house, skin dressing establishment, glue, soap, candle or starch factory, or other building for offensive purpose or occupation," was held to be sufficiently broad to include a public garage for the hire, storage and repair of automobiles and the furnishing of such supplies as they might need. *Hibberd v. Edwards*, 235 Pa. St. 454, 84 Atl. 437 (1912). In this case the court said: "The restriction above quoted is not a residential restriction limiting the property to residential uses, nor is it intended to be, but to guard and protect residences and inoffensive business places from the annoyance, discomfort and inconvenience of offensive establishments, such as are enumerated and others of like character. And in applying the restriction to trades, occupations and establishments other than those specifically prohibited it must be given a reasonable and fair construction. If the noise and odors were slight and infrequent and such as would only annoy and disturb a supersensitive or highly nervous person, it would be unfair to hold that the business or occupation came within the restriction; while on the other hand it would be equally unfair to hold that it was only applicable when they reached that degree which would annoy and disturb persons accustomed to noise and unpleasant odors by reason of their occupation or business. The test should be the effect upon the normal or rational man."

"Exclusive of the taverns and drinking saloons, the remaining enumerated occupations or businesses may be divided into two classes, the noisy and the malodorous and both are designated as offensive. Now from the great preponderance of the testimony it seems clear to us, that a garage is of necessity, both noisy and malodorous, not to the same degree or extent as some of the specifically prohibited occupations, but sufficient to annoy and disturb the witnesses of the plaintiff, apparently normal and rational men, in the quiet and comfortable enjoyment of their homes."

§ 192. Offensive to neighborhood for dwellings.—Garage.

A restriction against the erection on property of any buildings or shops or "any other business which shall be offensive to the neighborhood for dwelling houses," may properly be found to be violated by the erection and maintenance of a garage to accommodate about one hundred and twenty-five automobiles of the larger type, and for use as a store room and depository at which demonstration cars are kept, and which also contains a repair shop. *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039 (1907).

In this respect the court said: "The judge found that the erection and maintenance of such a garage would be a violation of the restriction. The findings of a judge, made upon the testimony of witnesses who appeared before him, will be followed by the full court unless they are plainly wrong. In the present case, while there was some conflict in the testimony, we are of opinion that the finding was right. There was much evidence tending to show that the business proposed to be carried on at the building would be 'offensive to the neighborhood for dwelling houses.' "

§ 193. Offensive to neighborhood.—Coal yard.

A coal yard was held to be a business offensive to the neighborhood within the meaning of a covenant prohibiting the erection or carrying on, upon the premises, any livery stable, slaughter house, tallow chandlery, smith forge, furnace, or any other manufactory, trade, or business whatsoever, which should or might be "in any wise offensive to the neighboring inhabitants." *Barrow v. Richard*, 8 Paige Ch. (N. Y.) 351, 35 Am. Dec. 713 (1840).

In this respect the court said: "There can be no doubt, if the allegations in the bill are true, that the use of lots numbers 12 and 13 as a coal yard is a clear violation of the covenants of the grantees of those lots. The language of the covenant shows that several other uses of the lots, far less offensive than this, are in terms prohibited, on the ground that they would probably be offensive to the neighborhood. The allegation in the bill on this subject, though it is a little

poetical, cannot be considered a mere poetic fiction; as it is sworn to by the complainant, and is admitted by the demurrer. He there states that large quantities of volatile and offensive dust and smut from the coal rises in the air, and are diffused by the wind into the premises of the neighboring inhabitants. And in spite of all their care, such coal dust and smut not only settle upon their walks, and their grass plat, but also on their fragrant plants and flowers, 'beclouding the brightness and beauty which a beneficent Creator has given to make them pleasant to the eye, and cheering to the heart of man.' But what must be still more offensive to the ladies of the neighborhood, 'this filthy coal dust settles upon their door steps, thresholds, and windows, and enters into their dwellings, and into their carpets, their cups, their kneading troughs, their beds, their bosoms, and their lungs; discoloring their linen and their otherwise stainless raiment and robes of beauty and comfort; defacing their furniture, and blackening, besmearing, and injuring every object of utility, of beauty, and of taste.' Making all due allowance for the coloring which the pleader has given to this naturally dark picture, it is perfectly clear that this keeping of a coal yard upon any of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants."

To the same effect is the case of *Barron v. Richard*, 3 Edw. Ch. (N. Y.) 96 (1837), in which it is held that a restriction in a deed to city property against carrying on or permitting on the premises, "any livery stable, slaughter house, or any other manufactory, trade or business whatsoever, which should or might be in any wise offensive to the neighboring inhabitants," is violated by a coal yard; the same being such an offensive trade as was contemplated by the covenant.

§ 194. Offensive trade or business.—Billboard.

The erection of a billboard and the exhibition of advertisements thereon in the form of posters was held to constitute an offensive trade or business within the meaning of a covenant prohibiting the carrying on of any offensive or danger-

ous trade or calling. *Nussey v. Provincial Bill Posting Co.*, 25 T. L. Rep. 489 (1909), 1 Ch. 734, 100 L. T. Rep. 687, 78 L. J. Ch. 539, 53 Sol. Jo. 418, 2 B. R. C. 425.

In this case the Master of the Rolls said, that bill posting is a trade or calling is beyond dispute, and that the only question in this respect is whether this trade or calling was within this condition offensive. He stated that the relevant facts here are that as appears by the original plan these plots were to be used for the erection of houses lying at a very substantial distance from the road, and contemplated as being houses which may have a lodge or man-servant's house. The grounds were so planted and so arranged, and were disposed of on such conditions to show that residential houses were intended to be built. The relevant provision then is, he said, that they shall not be "offensive." The context in which that word occurs shows that there are forbidden noisy trades or callings, which offend the ear; noisome trades or callings which offend the nose; trades or callings which expose a man to danger, and trades or callings which are "offensive." In this context this may mean offensive, not to the ear, not to the nose, nor by way of danger, leaving as an obvious meaning offensive to the eye. It is not confined to this, but, he said, he could see no reason why it should not extend to it. And further, the word "offensive" is to be construed relatively to the person contemplated as enjoying the benefit of the stipulation, that is to say, relative to such a person as would be the purchaser of such a plot upon such an estate as this is by the conditions and plans shown to be. He said then that the question is whether the trade or calling of a bill poster carried on upon a hoarding one hundred and fifty-six feet long and fifteen feet high carrying with it such disfigurements and such litter by way of waste paper and so on as would result from the employment of the site for such a purpose can properly be called offensive; that is, as legitimately furnishing ground for offense to a reasonable person such as was contemplated as the purchaser of a lot on this estate. His Lordship then continued: A man may be legitimately offended by an annoyance which does not amount to a legal nuisance. The evidence here is not strong, but it is sufficient,

I think, to show that this plaintiff and the other residents on the estate are actuated by considerations founded not in aesthetic sensitiveness, but in reasonably good sense in regarding such a hoarding as this occupied under an agreement for seven years for the purpose of posting bills as a legitimate ground of offense to them as owners of adjoining plots.

Construing a covenant prohibiting the carrying on of any offensive trade or business on the premises demised or granted, much will depend upon the situation of the premises; and it is particularly worthy of consideration whether such trade as that complained of was carried on there at the time of the demise. It would seem, therefore, that a trade carried on there at the time of the demise would not be within the covenant. *Gutteridge v. Munyard*, 7 Car. & P. 129 (1834).

§ 195. Offensive trade or business.—Fried fish business.

A covenant prohibiting the use of premises “for carrying on any offensive trade or business whatsoever” was held to be violated, in view of its location and the surrounding circumstances, by the carrying on of a fried fish business. *Duke of Devonshire v. Brookshaw*, 81 L. T. Rep. 83 (1899).

In this respect it was said by the court: “No doubt some trades or businesses cannot be carried on without offense to neighbors; many others can be carried on without giving offense, but can easily become offensive unless carried on with great care. I am not prepared to say that to carry on a fried fish business is to carry on an offensive business in the first class. It is quite possible, and I will assume that a fried fish shop can be carried on in a narrow street without giving offense to anyone. That is an abstract proposition which I assume for the purpose of my judgment. But the question I have to determine is whether, having regard to the nature of the business, and the locality in which it is situated, and the manner in which it is carried on, this is an offensive trade or business. Now, I have sufficient evidence to show that this business is so carried on as to be an offense to some of the neighbors. I have the evidence of several people who have lost lodgers, and have their houses unlet for this reason. Therefore, I have it proved as a fact that the business as

carried on offends many persons, and so far as I can judge from seeing them in the box the witnesses are not persons of extraordinary delicacy in the nostrils or elsewhere. I therefore think it is proved that the business is an offense to them. Then I have evidence on the other side that certain persons are not offended; but you can always meet people like these, they are the plaintiff's friends, perhaps determined not to be offended, not wishing to be offended, or having some reason for saying so. The business must be more or less offensive even to these witnesses, but they have all got some reason for saying they do not mind the smell, the existence of which they know. It is said that the defendant is doing his best to prevent the offense, but that is a double edged argument. I assume that he is doing his very best, but unfortunately that shows that the business is offensive, and how bad it would be if he did not take these precautions. That argument tells against him."

**§ 196. Injurious or offensive to neighboring inhabitants.—
Undertaking establishment.**

A restriction on the use of lots in a residence neighborhood against any buildings being erected, or trade or business carried on, which shall be injurious or offensive to the neighboring inhabitants, is violated by an undertaking establishment in which human bodies are prepared for burial or other sepulture, and sometimes embalmed, and subjected to post mortem examination, although it may not constitute a legal nuisance. *Rowland v. Miller*, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 (1893).

It was contended in this case that in effect the restriction simply related to nuisances, but the court held otherwise, saying: "If the agreement was intended simply to restrain any trade or business which was *per se* a nuisance, or which was carried on in such a way as to make it a nuisance, then it was wholly unnecessary. The law will always, upon the application of the party aggrieved, restrain and abate a private nuisance. This case is not governed by the general law as to nuisances, but by the force and effect of the covenants contained in the agreement. When the agreement was made,

the parties thereto, desiring to improve, protect, and benefit their lots, and consulting their respective interests, absolutely prohibited the carrying on of certain kinds of business specified upon the lots. They determined of themselves that those kinds of business were undesirable in the vicinity of residences, and covenants restraining them can be enforced without any proof whatever that they are 'injurious or offensive.'

. . . The business carried on by the Taylor company is not among those kinds particularly specified in the agreement. But the claim of the plaintiff is that it is prohibited by the general clause in the agreement, as 'injurious or offensive to the neighboring inhabitants.' This clause enlarges the scope of the agreement. It is a too narrow construction to hold that it prohibits only trades or kinds of business which are nuisances *per se* for reasons already given, and for the further reason that nearly, if not quite, all the trades and business specially named are not such nuisances. Any kind of business may become a nuisance by the manner in which it is carried on from its location, and a business may be offensive to neighboring inhabitants and yet fall far short of being a legal nuisance, which a court of equity will abate as such. This clause in the agreement must have a reasonable construction. We cannot suppose that the parties had in mind any business which might be offensive to a person of a supersensitive organization, or to one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind, ordinary, normal people, and meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood to such people undesirable as a place of residence. It cannot be doubted that the business of the Taylor company was, within this definition, offensive to the neighboring residents. People of ordinary sensibilities would not willingly live next to a lot upon which such a business is carried on. An ordinary person, desiring to rent such a house as plaintiff's, would not take her house, if he could get one just like it, at the same rent, at some other suitable and convenient place. Indeed, her house would

be shunned by people generally who could afford to live in such an expensive house."

The court permitted the defendant company to run the office and parlors connected with the premises, to solicit orders and sell coffins by sample in the wareroom, and to use the room called a "chapel" for the legitimate purposes of a chapel; that is, as a place of worship, without prejudice to the plaintiff to apply to the court to prevent or punish any abuses of the injunction as thus modified.

§ 197. Offensive or disagreeable noise or nuisance.—Boys' school.

A covenant provided that there should not be carried on on the premises the trade or business of a melter or boiler of tallow, or grease, or resin, or tar, or any greasy substance or compound for any purpose whatsoever, gas maker or worker, blacksmith, tin worker, copper worker, brick maker, lime burner, slaughterman, cat gut spinner, dog skinner, boiler of horse flesh, soap maker, beer shop keeper, brewer, scavenger, cow keeper, or any trade or business or occupation whatsoever, whereby any unwholesome or offensive or disagreeable matter, deposit or fluid, or any injurious or offensive or disagreeable noise or nuisance should or might be collected, occasioned, caused or made. It was held that the covenant was not limited to businesses or trades *ejusdem generis* to those specifically mentioned, and would prohibit the carrying on on the premises of a boys' school in the ordinary and reasonable way. *Wauton v. Coppard* (1899) 1 Ch. 92, 68 L. J. Ch. 8, 79 L. T. Rep. 467, 47 Wkly. Rep. 72 (1898).

In delivering the opinion of the court in this case Justice Romer said: "What I have to consider is whether I am satisfied by argument and the evidence before me that reasonable people living near, having regard to the ordinary use of their houses for pleasureable enjoyment, could and would regard the carrying on of that school in the ordinary way on these premises as causing an injurious, offensive, or disagreeable noise or nuisance; and, after hearing the argument and on the evidence before me, I answer this question in the affirmative."

§ 198. Tend to disturb the quiet or comfort of neighborhood.—Grocery.

The sale of groceries and provisions is not a trade or calling "which shall tend to disturb the quiet or comfort of the neighborhood," nor can it be considered as a "nauseous or offensive trade." *Tobey v. Moore*, 130 Mass. 448 (1881).

§ 199. Dangerous, noxious, unwholesome or offensive.—Livery stable.—Bake ovens.—Boarding house.

A covenant not to erect any building for or to carry on thereon certain trades, cow stables, or hog pens, "or any other dangerous, noxious, unwholesome or offensive establishment, trade or calling, or business whatsoever," is not violated by the erection of a livery stable and the carrying on of a livery business on the property in question. *Flanagan v. Hollingsworth*, 2 How. Pr. (N. S.) 391 (1885).

In its construction of this restriction the court said: "If stable had been prohibited in so many words, then the general words would not refer to them, and we think that the use of the word 'stables' has the same effect though it is preceded by the word 'cow.' That word limited the establishments prohibited of the same class, and the words 'other, etc.,' do not include stables where domestic animals are to be kept. The parties could have prohibited all stables by omitting a single word. Effect should be given to all the words of a contract if possible, and if the parties prohibited one of a class they considered all of that class, and intended to prohibit those mentioned and not others of the same class. Those who made the covenant agreed that livery stables were not offensive, and the conclusion arrived at by them is binding upon their grantees."

A restrictive covenant against the carrying on of "any noxious, offensive or dangerous trade or business," does not merely prohibit nuisances which are unlawful in themselves, but prohibits many trades which are not nuisances *per se*. *Dieterlen v. Miller*, 114 N. Y. App. Div. 40, 99 N. Y. Supp. 699 (1906).

A restrictive covenant prohibiting the carrying on of any business which may in any wise be "dangerous, noxious or

offensive to the neighboring inhabitants" was held to be violated by the installation of bake ovens thereon projecting from the rear of a house into the yard and intended to be used in connection with a bakery, the entire covenant tending to show an intention to confine the use of the lands to residential purposes. *Simons v. Mutual Construction Co.*, 132 N. Y. App. Div. 719, 117 N. Y. Supp. 567 (1909).

In this case the court said: "From the whole covenant it seems clear that it was the intention of the parties to confine the use of the land conveyed to dwelling purposes or business which would not be noxious or offensive to those who occupied it in that way. It certainly cannot be said that the use of two bake ovens of the size located and to be used as the two in question are intended to be would not be noxious or offensive to persons using other portions of the property, including that adjoining, for residential purposes. To some persons the odors arising from the use of these ovens might be as offensive or annoying as odors arising from the carrying on of any of the other kinds of business prohibited."

A covenant against the carrying on on the premises in question of any "offensive, noxious or dangerous trade or business," has been held not to be violated by conducting a boarding house thereon. *Biggs v. Sea Gate Assn.*, 211 N. Y. 482, 105 N. E. 664 (1914).

§ 200. Obnoxious or offensive to neighborhood.—Residence for hospital nurses.

A restriction against the use of premises for "any manufactory, trade or business whatever, which may be in any wise obnoxious or offensive to the neighboring inhabitants," is not violated by the erection of a building to be used solely for a residence for hospital nurses. *Moller v. Presbyterian Hospital*, 65 N. Y. App. Div. 134, 72 N. Y. Supp. 483 (1901). The court said: "The building that is to be erected by the defendant on this property is to be used as a residence for the nurses engaged in hospital work, and there is nothing to justify the conclusion that a building so used would be any more obnoxious to neighboring inhabitants than a building used for a residence for any other class of persons. The proposed

building, as stated by the vice-president of the Presbyterian Hospital, is to be used as a dwelling house of the most strict and exclusive character, to be occupied by the superintendent and his family and the nurses of the hospital. 'It is to be neither a flat house, a tenement house, nor a boarding house, but the utmost care will be exercised in the selection of those who are or will be admitted to it, and its inmates will be constantly subjected to a careful supervision and constraint.' There is certainly nothing used in a building of this character that can be said to come within the restriction of the Lenox covenant. . . . Assuming that the use to which the defendant was to put the property could be included within the term 'business,' it is not every business that would be affected by this covenant. It is not claimed that this use could be included within any of the specific businesses mentioned in the covenant. To be included within the general terms mentioned, it must be found as a fact that it is a business 'which may be in any wise noxious or offensive to the neighboring inhabitants.' "

§ 201. Noisome or offensive trade.—Storage of matches.

A covenant not to carry on any noisome or offensive trade on the premises in question, is not violated by the deposit of large quantities of matches, by reason of which use the premises are rendered so dangerous as to be uninsurable against fire, the word "dangerous" not being in the covenant. *Hickman v. Isaacs*, 4 L. T. Rep. 285 (1861).

§ 202. Offensive, annoying or disturbing to other tenants.

—Public house.

A lease of premises contained a covenant on the part of the lessee that he should not permit any person to inhabit the premises who should carry on certain specified trades or businesses (that of a licensed victualler not being one of those), or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants. It was held that the opening of a public house on the premises was not a breach of the covenant. *Jones v. Thorne*, 1 Barn. & C. 715, 3 Dowl. & R. 152, 1 L. J. K. B. 200, 25 Rev. Rep. 546 (1823).

§ 203. Injurious affect adjoining premises.—Shops and flats.

A covenant against using premises for any purpose which shall injuriously affect the use of adjoining premises, is not violated, as a matter of law, by the erection of shops and flats thereon. *Curley v. Brown*, 44 N. Y. App. Div. 480, 60 N. Y. Supp. 846 (1899).

§ 204. Nauseous or offensive.—Question of fact.

Whether or not a stable is a "nauseous or offensive business," is mainly a question of fact, depending in some measure on the extent and mode of use of the premises for the purposes of a stable. *Whitney v. Union R. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858).

§ 205. Use of granted or leased premises when use specified without prohibitive clause.

The general rule is that a lessee of real estate has a right to pursue thereon any lawful business he chooses, which is not prohibited by the lease, and which is not injurious to the premises. *Taylor v. Owen*, 2 Blackf. (Ind.) 301 (1830).

It has been held that a lease of premises to be used for a specified business does not restrict the use of the premises by the lessee to that business, in the absence of further expression of such intent, or other circumstances showing that the use of the premises was intended by the parties to be restricted to that specified. *Chamberlain v. Brown*, 141 Ia. 540, 120 N. W. 334 (1909).

Thus, it has been held, that the words "to be used as cabinet ware rooms," following immediately after the description of the premises in a lease, do not imply a covenant on the part of the lessee not to use the premises for any other purposes than as cabinet ware rooms. *Brugman v. Noyes*, 6 Wis. 1 (1857).

It was contended on behalf of the lessee in this case that there was no express covenant in the lease restraining the use of the premises to cabinet ware rooms, and that a court of equity will not imply a covenant in restraint of a beneficial use of property. In this respect the court said: "This argument strikes us as sound and conclusive against the right of

the complainant to maintain his bill. If the complainant had leased the premises expressly and exclusively to be used for a particular purpose, or in a particular manner, and there was a continuing breach or disregard of the stipulation, a court of equity would perhaps interfere and enforce the restriction by compelling the lessees to use them for their business. The insuperable difficulty in this case is, that there is no express covenant not to use the buildings except for cabinet ware rooms. The clause in the lease is that the buildings were to be used as cabinet ware rooms, without words of restriction. It appears that there is another clause in the lease that no cabinet ware should be manufactured in the buildings; and probably this express prohibition would have been enforced had the lessee entered upon the business of manufacturing cabinet ware. The counsel for the complainant contends that the clause in the lease that the premises were to be used as cabinet ware rooms, amounts to a direct covenant to use them as such, and for no other purpose whatever. We are unable to concur in this construction of the lease. Of course the intention of the parties, as that intention is gathered from the whole lease, must control in the case. And looking at the language of this clause as well as of other clauses, as disclosed in the bill, we do not feel authorized in saying that defendant's meaning of the words employed, so that it was the intention of the parties to restrict the use of the buildings to cabinet ware rooms, and prohibit the use of them for any other purpose. We think such a construction is forced, and ought not to be adopted. As already observed, there is an express covenant against manufacturing cabinet ware in the buildings, and it seems but fair to presume, that if the parties intended restraining the use thereof to cabinet ware rooms they would have distinctly and expressly stipulated to that effect. It is obviously inconsistent with the principles upon which courts of equity act, to raise by implication a covenant in restraint of the beneficial use of property."

Especially is this so where the lease contains an express covenant that the lessee will not suffer any waste or any unlawful, improper or offensive use of the premises. *Chamberlain v. Brown*, 141 Ia. 540, 120 N. W. 334 (1909).

It was held that a lease which recited that the building was let for the purpose of conducting a first class saloon, "and shall not be used for any disreputable purpose," and further provided that the premises should not "be sub-let for any purpose other than for conducting a saloon, without the consent of the landlord in writing," did not limit the lessee in the use of the premises to saloon purposes. *San Antonio Brewing Assn. v. Brents*, 39 Tex. Civ. App. 443 (1905).

A parcel of ground was conveyed "to be used for milling or manufacturing purposes only." Held, not to bind the grantee to erect a mill of any kind upon the property. *Re Madore*, 129 Pa. St. 15, 17 Atl. 804 (1889).

In this case it was said by the court: "The deed contains no covenant to erect a mill of any kind upon the property; the grantee acquired a right to do so, and to make use of the water power. The grantor has no legal cause to complain of his grantee if he does not exercise all the rights and privileges which he purchased and paid for."

The trustees of a school district purchased a piece of land which was conveyed to them in fee simple, and running to their successors and assigns, and in the habendum clause the deed recited: "To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said parties of the second part, their successors and assigns, for the uses and purposes of school district No. 10, of the said town of Greenburgh, upon which to erect a school house and other appurtenances for said school district No. 10, in said town of Greenburgh, forever." The deed was executed by the grantors alone, and there was no covenant on the part of the grantees not to use the property for any other than school purposes, and no provision for forfeiture and re-entry. It was held that the trustees acquired a fee simple title absolute to the property, and the recital in the habendum clause did not constitute a condition, covenant or restriction binding upon the trustees to devote the property to school purposes, but simply amounted to a recital of the purpose for which the trustees bought the property. *Board of Education v. Reilly*, 71 N. Y. App. Div. 468, 75 N. Y. Supp. 876 (1902).

A city having full power and authority purchased land and

in the deed of conveyance it was provided that it was understood that the land was granted to the city "for city hall purposes only." Held, that the conveyance vested an absolute title to the land in the city. *Huron v. Wilcox*, 17 S. D. 625, 98 N. W. 88, 106 Am. St. Rep. 788 (1904).

It was said in this case that in order to qualify the ownership of land by the restriction of its use, as contemplated by section 196 of the civil code of 1903, of South Dakota, the limiting clause must be connected with the grant in the deed so as to restrict the conveyance and have for its object the recission, suspension, revocation, or impairment of the estate in case the grantee fails to comply therewith; and that there was nothing in the deed to justify the implication that anything but the transfer of an absolute estate was intended.

A conveyance of land to a town "to erect a pest house upon," and to enjoy in the manner aforesaid, and in the habendum clause containing the recital that, "to have and to hold the said bargained and granted premises with all the privileges and appurtenances thereto belonging, or in any wise pertaining, for the use aforesaid, forever," was held to be a mere description of the intention of the town at the time of the purchase, and was not intended as a condition or limitation upon the estate granted. *Ward v. New England Screw Co.*, 1 Cliff. (U. S. C. C.) 565 (1860).

A conveyance of land to a county "for court house and other county buildings," was held to convey an estate without limitation or restraint, and that the clause quoted constituted a mere declaration of the intention at the time of the purchase of the land. *Board of Supervisors v. Patterson*, 56 Ill. 111 (1870).

In this case it was said that, if A. buys a lot of ground of B., and it is declared in the deed that he purchased it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention.

A lease of two rooms recited that they were to be used as "real estate and conveyance offices," but the lease contained no clause prohibiting their use for other purposes. The rooms were used as the offices of a justice of the peace and a

constable, and it appeared from the evidence was less desirable, as regarded the renting of other parts of the building, than that recited in the lease, but such use of the rooms did not create a nuisance, nor was it shown that it in fact created a decrease in the rent of the other parts of the building. The court held that there was not a breach of the covenant. *White v. Kane*, 53 Mo. App. 300 (1893).

§ 206. Same subject.—Contrary view.

However, from the wording of the entire instrument, it may appear to have been the intention of the parties to restrict the use of the demised premises to that expressly mentioned. A small tract of land was leased with the provision that, "said land not to exceed three acres, and to be used for creamery purposes. . . . This land is rented to be used for creamery purposes by said Welch brothers, who shall also have the right to build a store building on said land in connection with said creamery." It was held that the lessee was not entitled to erect buildings thereon for different purposes, in addition to those contemplated by the lease. *Kraft v. Welch*, 112 Ia. 695, 84 N. W. 908 (1901).

It has been held that a recital in a lease of the purposes for which the demised premises are let, constitutes an express covenant on the part of the tenant to use them for no other purpose, and that where a lease recited that the landlord let the premises to the tenant "to be occupied as a lumber yard," this declaration of intention constituted an express covenant on the part of the tenant to occupy them for that purpose, and that the erection of buildings thereon by the tenant's assignee constituted a wrongful act under the covenant. *De Forest v. Byrne*, 1 Hilt. (N. Y.) 43 (1856).

In Louisiana, by statute, a lessee is bound to use the leased premises according to the use for which it was intended by the lease, although the purpose for which the premises were leased is not expressly stipulated in the lease. Accordingly, it has been held in that state, that the establishment of a house of prostitution, or of a gaming house, would in no case be sustained, unless the lessor had positive knowledge that such was the use for which the lessee rented the premises.

Where the lease is silent as to the nature and kind of use contemplated between the parties, resort must be had to parol evidence of the surrounding circumstances to ascertain the intentions and define the rights of the parties.

In a case in which the evidence showed that the building leased was contiguous to the depot and stables of plaintiff, and was built to serve as a boarding house and lodging house for drivers and other employes; that it had been used to some extent for that purpose, and had never been otherwise used, except partially, as business offices; that plaintiff had received numerous offers to rent it as a bar room or coffee house at much higher rent than was paid by defendant, but had always refused; that no bar room or other place for sale of spirituous liquors had ever been permitted; that defendant, prior to the lease, had kept the private market not far from this place, in which business he had been engaged for many years, and that he had never kept a bar room or coffee house; that, when he applied to rent the place, he asked permission to open a private market there which was at first refused and only granted after discussion and intervention of friends; that for the first three months of the lease he used the house simply for the purposes of a private market and for offices and lodgings, and that it was only after that time that he indicated his purpose of opening the bar room; and that as soon as plaintiff heard of such purpose, it promptly protested against and prohibited it, it was held that it was amply established that the opening of a bar room in the house was contrary to the use for which it was intended by the lease. *New Orleans & Carrollton R. Co. v. Darms*, 39 La. Ann. 766 (1887).

A deed to real estate to an incorporated school provided, "said land and buildings shall be used for the purposes of said school, and for no other purpose." Held, that the covenant created a valid restriction on the use of the land to the particular purpose for which it was conveyed, which was binding on all persons taking the property with notice thereof. *Board of Supervisors v. Bedford High School*, 92 Va. 292, 23 S. E. 299 (1895).

The grantor of property "for the sole use and behoof of a

public park," has been held to be entitled to enjoin a violation of such restriction by a diversion of the property to other uses than that of a park. *Bayard v. Bancroft*, ... Del. Ch. ..., 62 Atl. 6 (1905).

§ 207. Specific enumeration of prohibited uses impliedly permits others.

The specific enumeration of trades or businesses for which the land conveyed is forbidden to be used, impliedly permits its use for other trades and businesses not enumerated.

A covenant provided, that the grantee should erect a substantial two story dwelling house to cost not less than two thousand five hundred dollars; that no building should be erected within twenty feet of the street; that certain enumerated businesses and trades should not be carried on on the premises, and that buildings for specified uses should not be erected thereon. Held, that the covenant did not prohibit the use of the premises for businesses and trades other than those specifically enumerated, after its other terms had been complied with. *Hurley v. Brown*, 44 N. Y. App. Div. 480, 60 N. Y. Supp. 846 (1899); *Flanagan v. Hollingsworth*, 2 How. Pr. (N. S.) (N. Y.) 391 (1885).

§ 208. Specified use only.—Not violated by failure to use for that purpose.

A covenant providing that the lessee should not use or permit the demised premises to be used for any other purpose than for a saloon, was held not to be broken by ceasing to use it for the purpose of a saloon, providing that it was not used for any other purpose. *McCormick v. Stephany*, 57 N. J. Eq. 257 (1898).

§ 209. Cotton gin.—Small residences for employees.

A deed of conveyance provided that, "The above property is conveyed solely for the purpose of a gin and to be solely and only used for a gin site, and in the event it is not used for such purposes, then it is to revert to me." Held, that where the grantee erected a gin on the property and continued to operate it, the condition was not broken by the erection by

him on the land of a small residence house for the use of his employes, and his permitting the erection of a blacksmith shop thereon. Such use for the other purposes did not interfere with the use of the property for gin purposes. *Gleghorn v. Smith*, 26 Tex. Civ. App. 187, 62 S. W. 1096 (1901).

In this case it was said by the court: "It will be noted that while said deed provides that the property conveyed is to be used solely and only for a gin site, no provision is made for a reversion in case it is used for some purpose in addition to gin purposes, but that said lot is to revert in the event it is not used for gin purposes. The land is used for gin purposes, and because small portions are used for other purposes which do not interfere or conflict with its use for gin purposes does not operate as a reversion of the title."

§ 210. Court house and jail.—Stable.

The conveyance of land subject to a restriction that it shall be used for the purposes of a court house and jail, is not violated by the erection of a stable on the premises, as the grant includes the right of erecting a dwelling house for the jailer, with proper outhouses. *Jackson v. Pike*, 9 Cow. (N. Y.) 69 (1828).

§ 211. Livery stable.—Private club stable.

A restriction against the erection of a "livery stable" or "building for offensive occupation," is not violated by the erection of a private club stable. *Warbrick v. Way*, 32 Leg. Int. (Pa.) 413, 2 Wkly. N. Cas. 413 (1875).

§ 212. Studio and salesroom.—Saloon.

A three story and basement brick dwelling was leased "to be occupied for a studio, salesroom and dwelling purposes and for no other purpose whatever." It was held that such provision was violated by the carrying on of a saloon business in the basement of the building. *Bryden v. Northrup*, 58 Ill. App. 233 (1895).

In this case the court said: "Now while we often hear dram-shops spoken of as saloons and see them so mentioned in the city ordinances, and on signs upon them may read, 'sample

room,' 'family resort,' and, perhaps other designations, yet no one has, as we verily believe, yet endeavored to attract custom by calling his dramshop a 'studio' or 'salesroom.' In a strained construction, a dramshop, being a place where sales are made, might be held to be a salesroom; yet such a construction would violate the rule" that we must give to the words their common and generally accepted meaning.

§ 213. Dry goods jobbing business.—Business of auctioneer.

Where premises are leased for the carrying on of a regular dry goods jobbing business and for no other purpose, the lessee will be enjoined from carrying on the business of an auctioneer thereon. *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587 (1847).

§ 214. Oil cloth and dry goods store.—Auction sales.

A lease provided that the demised premises shall "be used and occupied as an oil cloth and dry goods store," and further that the lessee "would neither place or cause or allow to be placed, any sign or signs of any kind whatsoever, at, in or about the entrance to said store, except in or at such place or places as may be indicated by the said landlords and consented to by them in writing." It was held that the conduct of auction sales of oil cloth and dry goods at such store and the displaying of an auctioneer's flag announcing such sales without the permission of the lessors constituted a violation of such covenants. *Weil v. Abrahams*, 53 N. Y. App. Div. 313, 66 N. Y. Supp. 244 (1900).

In this case the court said: "Now, in this case, it is admitted that the right to occupy the premises for the dry goods business was obtained after the execution of the lease, which stated that the premises were to be used and occupied as an 'oil cloth store.' This addition to the proposed lease was made at the request of the defendants, and by that request, I think, the parties put a practical construction upon the language of the lease and agreed that the premises could not be occupied as a dry goods store without the permission of the landlords. That being so, it is perfectly clear that the auction business could not be carried on upon the prem-

ises by the defendants unless the permission so to do was inserted in the lease. The contention by the defendants that the auctioning off of goods was merely incidental to the oil cloth business, or to the dry goods business, cannot, in my opinion, be maintained, not only because a sale by auction is not the usual way of conducting the oil cloth and dry goods business, but also because, a dry goods business is very different from an auction business."

§ 215. Use of land for sale of intoxicating liquor.—Sale by druggist.

A restriction prohibiting the use of land for the sale of intoxicating liquors does not prohibit the keeping of a drug store, where liquors are sold in the manner in which they are ordinarily sold by druggists, but not to be drank upon the premises. *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218 (1892).

§ 216. Manufactories.—One not known at time restriction made.

The fact that the manufacture of a certain product was unknown at the time of the making of a restrictive covenant excluding manufactories from the land in question, does not affect such covenant in its application to such business. No distinction can be drawn between manufactories in existence at the time the covenant was made and those thereafter coming into existence. *Scrymser v. Seabright Electric Light Co.*, 74 N. J. Eq. 587, 70 Atl. 977 (1908).

"It may be conceded," said the court, "that when this covenant was framed and the Monmouth Beach scheme was promulgated, about thirty-five years ago, the manufacture of electricity in electric light stations was unknown. In view of the annoyance and discomfort which was the intention of the scheme to exclude from this large residential district, no distinction can be drawn between manufacturing businesses which were in existence when the scheme was promulgated, and manufacturing businesses which might thereafter come into existence."

§ 217. Manufactory.—Electric light plant.

An electric light station, with the usual equipment of boilers and engines, has been held to be a manufactory within the meaning of a restrictive covenant excluding the use of property for the purpose of any manufactory. *Scrymser v. Seabright Electric Light Co.*, 74 N. J. Eq. 587, 70 Atl. 977 (1908).

In this case the court said: "In my judgment it is useless to go into speculative questions as to the nature of electricity or the nature of the product, if there be a product, of the electric plant which the defendant operated at the time of the filing of the bill. At different periods in the history of electrical discovery very different views have been entertained on this subject. At one time this plant might have been regarded as a manufactory of a 'fluid.' More recently it might be deemed to be turning out electrons or ions. . . . This electric light station, with the necessary incidents attending its operation, is in my judgment as clearly a manufactory, within the meaning of this protective covenant, as it is a manufactory within the meaning of the mechanics' lien law."

§ 218. Business of a publican.—Licensed spirit grocer.

A lease contained a covenant on the part of the lessee that he, or any person claiming or deriving by or under him, would not at any time during the continuance of the term follow the trade or business of a publican. Held, not to be violated by trading as a licensed spirit grocer on the premises. *Re Cullen & Rial's Contract* (1904), 1 Ir. Rep. 206.

In this case it was said by the court: "In Ireland the trade of a spirit grocer was created by a statute of the Irish Parliament more than a century ago. Ever since that time the difference between the trade of a spirit grocer and the trade of a publican has been well marked and has been frequently noticed by the courts. The Irish public house is a development of the old English inn or ale house; and although the publican's license authorizes him to sell liquor for consumption 'off,' as well as for consumption 'on,' his premises, it has always been an essential characteristic of the publican's trade or business that he keep a 'house of entertainment.'"

where his customers can and do partake on the spot of the refreshments they require. It was this characteristic which, from early times, necessitated stringent restrictions as to the granting and renewal of publicans' licenses, and severe disciplinary enactments as to the regulation and control of a publican's trade. On the other hand, the spirit grocer's establishment is not, and never has been a 'house of entertainment.' He is a shop keeper with no authority to sell liquor for consumption 'on' the premises; and his authority to sell liquor for consumption off the premises is limited to small quantities of spirits, not exceeding two quarts."

§ 219. Town house only.—Partly used for other purposes.

A conveyance of land to a town provided that the same "shall not be used for any other purpose than as a place for a town house for said inhabitants." The town erected a building on such land larger than its immediate requirements demanded, and the second floor was used as a hall for various purposes, and rooms on the sides of the entrance had been let and used for shops and other purposes not connected with town business. Held, that such use was not a violation of the covenant, as the town had a right to erect a house of sufficient capacity for all the business which it may have occasion to do in such a building, and may, in its erection, make suitable provision for prospective wants. *French v. Quincy*, 3 Allen (Mass.) 9 (1861).

§ 220. Opera house of the first class.—Second class plays and vaudeville.

A covenant in a lease of a building recited that if the lessee "should use the said premises, or any part thereof, for any other purpose than a theater and opera house of strictly the first class, for the production of standard modern plays, operas and attractions of the highest class, or should violate any other agreement or covenant contained in the lease," then the grantors should have the right at their election to terminate the lease. Held, that the production of popular price (or second class) melodramas, vaudeville and burlesque, though they may be the best of their kind and correctly designated

first class melodrama, first class vaudeville, and first class burlesque, constituted a violation of such covenant. *Re Schoelkopf*, 54 N. Y. Misc. 31, 105 N. Y. Supp. 477 (1907).

§ 221. Against building on premises.—Addition to old building.

A lease contained a clause prohibiting the lessee from building on the demised premises, without the consent of the lessor, any dwelling house, edifice, cabin, farm or other building, which should in the whole or in part be occupied as a dwelling house. Thereafter, without the consent of the lessor, the lessee added on to an existing dwelling house a building containing several apartments, communicating with the original dwelling, and used with it as one entire building. Held, that the erection constituted an additional structure, and was a breach of the covenant. *Domville v. Colville*, 1 R. 7 Com. L. 68 (1873).

§ 222. Trade of butcher.—Selling raw meat at retail.

A covenant in a lease prohibiting the exercise on the demised premises of the trade of a butcher, has been held to be broken by the selling of raw meat by retail thereon, although no beasts were slaughtered there. *Doe v. Spry*, 1 Barn. & Ald. 617 (1818).

§ 223. Divine service.—Sunday school.

The meaning of "divine service," like a work of art, is to be determined by the sense in which it was used by the parties. A German Reformed congregation and a Lutheran congregation built a church together, in which by their articles of association "divine service" only was to be held, and for many years there were no meetings in it except for public worship. Against the protest of one of the congregations, the other introduced a Sabbath school into the church. It was held, under the facts in the case, that Sabbath schools were not included in "divine service." *Re Gass*, 73 Pa. St. 39 (1873).

It was shown in this case that for a period of more than twenty years, no other than meetings for public worship or

preaching the gospel were held in the church; that a union Sunday school, organized and kept up by the congregations, was held for many years in a schoolhouse close by the church. That the Lutheran congregation withdrew from the union Sunday school, and established one of their own in the audience room of the church. In respect of this question the court said: "However right it may be to view the Sunday school as a most useful institution in instructing youth in the knowledge and worship of God, and their duties to mankind, this praiseworthy view cannot change a written contract. We cannot engraft on a contract for one thing an agreement for a different thing, though the fruit of the scion be even better than that of the natural stock. The congregations never so understood or acted upon their agreement of union. They built their church for divine worship, by prayer, praise, and the preaching of God's word. Its use was to be congregational worship, not school instructions. Their worship was to be led by pastors, who should regulate their appointments in due regard to mutual harmony, and was not to be the instruction of youth, even though part of it were in divine things, led by individual laymen. We think the court erred in deciding the case according to the general meaning of the words 'divine service,' as testified to by some of the witnesses, instead of confining their signification to the sense to which the congregation understood it when they entered into the agreement, and afterwards practiced upon it."

§ 224. Church purposes.—Abandonment.

Land on which was located a church building was conveyed to be used for church purposes and no other, and subject to the reservation or condition that "if the owners or proprietors of the brick meeting house or church should neglect or omit to occupy the land for that purpose, and by continuing a meeting house or church, then the land should revert to the grantor and his heirs." It was held that the purpose of this grant was to have the house used as a church, not necessarily the same house or a brick house, but a house to meet in for religious worship, not constantly necessarily, but kept for that use, and not put to any other use substantially inconsistent

with that. Total abandonment for such use would constitute a breach of the condition, though the house continued to stand and was put to no other use; but destruction by casualty would not constitute a breach while the intention to rebuild was entertained in good faith. Long continued delay to rebuild, or take any measure to do so, would be strong evidence of a discontinuance of the intended use, but not conclusive. Lack of repairs would be evidence of the same character, but still less conclusive. *Howe v. School District No. 3*, 43 Vt. 282 (1870).

In this respect the court said: "The testimony in this case shows a want of repair in the house to a considerable extent; also that the spiritual church accustomed to meet there is weak, and that the owners and proprietors of the house are not zealous in carrying forward religious worship in it. It is well known, however, that many churches have been weaker than this is, and the owners and proprietors of houses of religious worship more cold than these are, and after that the churches have revived and prospered, and the societies become strong and efficient. In view of all experience in such matters, it cannot be assumed but that a time of strength and prosperity will follow the present time of weakness of this church while it has so many members as it now has, and still less, that it has abandoned its hope of existence or its house of worship. Upon all the testimony, it is not found that there has yet been any breach of the trust and confidence upon which this grant was made, in respect to a continuance of a meeting house or church upon the land."

§ 225. School purposes and uses consistent therewith.

A lot was conveyed to several grantees "for school purposes and such other uses consistent with its use for school purposes as a majority in interest of the owners may determine," but the conveyance provided that its use for school purposes was not to be abandoned "except by the written consent of those who may own at least ten-thirteenths of said land." It was held that a majority of the owners could determine its use for school purposes or other use consistent therewith, but less than the owners of ten-thirteenths could

not subject it to any other use. *Calvert v. Pewee Valley*, 15 Ky. L. Rep. 644, 25 S. W. 5 (1894).

§ 226. Covenant to keep premises clean.

A lease contained a covenant that the lessee should keep the premises "clean," and further that the premises should not be occupied for a saloon or meat market. It was held that the covenant to keep the premises clean was not qualified by any implied right on the part of the lessees to use the premises for any purpose, however foul in itself, excepting only those occupations mentioned. *Clementson v. Gleason*, 36 Minn. 102, 30 N. W. 400 (1886).

Nothing was here shown to qualify the meaning to be given to the conditions of the lease to keep the premises clean. It was held that the terms of the lease did not authorize the lessees to occupy the premises for any business, however foul in itself, by excepting that of a meat market and saloon. "On the contrary, the agreement to keep the premises clean would prevent their use for any purpose which would necessarily make them foul and unclean. The condition expressed was not merely to keep the premises clean, provided the nature of the use to which the lessees should put the property would render that possible, or as clean as the nature of the business which the lessees might elect to carry on there would allow, but to keep them 'clean.' "

CHAPTER VII.

MISCELLANEOUS RESTRICTIVE PROVISIONS.

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§ 227. "Objectionable."—Two-family flat.

A two-family flat house has been held not to be "objectionable," within the meaning of a covenant restricting the use of a lot "in any objectionable manner whatever." "Perhaps two-family houses may not be as desirable in a residence district like this as a one-family house," said the court. "Nevertheless, that fact cannot make them legally 'objectionable.' When this word was used in the original deed, something more must be deemed to have been intended than a mere matter of sentiment; and, if the continuance of the injunction depended upon the mere question that the building under process of erection is to be a two-family house, the plaintiff would necessarily fail. To justify an injunction because the building in process of erection is a two-family house would necessitate the court's holding that such a house is not to be used for 'residence and dwelling purposes,' which is expressly authorized by the deeds in question. The very statement of the case makes plain the untenableness of the plaintiff's position in this regard." *McDonald v. Spang*, 55 N. Y. Misc. 332, 105 N. Y. Supp. 617 (1907).

§ 228. "Subject to."

The words "subject to" mean under the control, power, or subject to the dominion of, or subordinate to, and are not words of contract, and impose on the grantee in a deed no contractual obligations. Thus, the conveyance of land subject to a mortgage imposes no personal liability for its payment.

A lot was conveyed with restrictions imposed thereon to the effect that the front of any residence should not be less than forty feet west of the east line of the lot, and providing that no other building than a residence should be erected on the front half of the lot, but there was nothing in the deed restricting the back half of the lot. Subsequently part of the back half of the lot was deeded to defendant "subject to" the restrictions mentioned in the former deed. Held, that the defendant took his portion of the lot free of any restrictions. *Van Duyn v. Chase & Co.*, 149 Ia. 222, 128 N. W. 300 (1910).

In this case the court said: "From taking the conveyance of the small tract of land at the rear of the lot subject to the

restrictions in an earlier deed to the lot, no new obligation is implied. The most that can be said is that it became impressed by and servient to the restrictions contained therein, and, if these did not relate thereto, there is no ground for implying like restrictions as imposed thereby on the tract conveyed to Chase. Moreover, it is not to be overlooked that the law favors the utmost freedom in dealing with real property. It is recognized as an article of commerce. As new wants develop, and business increases and expands, the uses to which it is devoted are constantly changing. To tie up realty with restrictions and prohibitions where the fee is conveyed, is opposed to the settled business policy of the country; and for this reason, in construing deeds containing restrictions and prohibitions as to the use, doubts are to be resolved in favor of the free use of the property. We are of the opinion that the restrictions in the deed from the church to plaintiff imposed no restrictions on the rear half of the lot, and that the conveyance by him to Macomber and from the latter to Chase 'subject to' such restrictions neither extended nor enlarged such restrictions, so as to extend them to the tract conveyed."

§ 229. Restrictions against form of construction, and not use, of building.

A restriction that "no buildings other than dwelling houses (which word shall include club houses), with the usual out-buildings appurtenant thereto, shall be erected, placed or used upon the said land," was held not to restrict the use of such buildings to dwelling house purposes, and such houses when erected may be used for any lawful purpose. *Carr v. Riley*, 198 Mass. 70, 84 N. E. 426 (1908).

A covenant in a deed provided against the erection on the land conveyed of any "tenement house," or any "house except private dwellings." Held, that a three-story building, each floor constituting a complete apartment for housekeeping, was not a private dwelling within the meaning of the covenant; that the covenant was one against construction, and not against use, and the fact that defendant did not intend to have it occupied by three families was immaterial. *Levy v. Schreyer*,

27 N. Y. App. Div. 282, 50 N. Y. Supp. 584 (1898), reversing 19 N. Y. Misc. 227, 43 N. Y. Supp. 199 (1897).

A restriction prohibiting the erection of any buildings other than dwellings, apartment or flat houses, churches, schools, or private garages, has been held not to forbid the use of the basement of a dwelling house on such premises for the carrying on of a retail business in foodstuffs, where the outward appearance of the building was not changed. *Hoffman v. Parker*, 239 Pa. St. 398, 86 Atl. 864 (1913).

In this case it was said by way of illustration by the court: "If a dressmaker or milliner received her patrons at her dwelling house and delivered her finished work there, it could not be said that she had erected a store. If she altered the building by throwing out a bulk or show window and carried on the same business, she might fall within the prohibition of the restriction. This seems to be the inevitable reading of the agreement. It necessarily follows that the matter of the external construction is the one with which the agreement deals."

A restrictive covenant that, "no building other than one single dwelling house shall be maintained on said lot," is not violated by the use of such a dwelling house as a private institution for the treatment of persons suffering from the liquor habit and kindred habits, who are boarded and lodged there while undergoing treatment. *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768 (1897).

In this respect the court said: "We do not see our way clear to give to the plaintiffs the relief which they seek. The house was built and occupied as a single dwelling house by its original owner. Since then it has not been altered in construction, either inside or outside. So far as its mode of building goes, it remains a single dwelling house. We do not determine whether any possible change in the manner of its use would be a violation of the restriction. It might, for example, be wholly given up as a residence, and used only for some purpose of trade. But its use as a residence continues, with some approach also towards a use as a private hotel or a private hospital. The words of the restriction are not very strong. They do not say that no building upon the

granted land shall be used for any other purpose than as a private residence for a single family without boarders; or even that no building shall be used otherwise than as a single dwelling house. The provision, omitting words not now material, is that no building other than one single dwelling house shall be maintained on said lot. So far as the material structure is concerned, no other building is maintained there. No doubt the present use is such as might reasonably have been provided against, if it had been anticipated. But the words are not plain. While a reasonable interpretation is to be given to them, doubts are to be resolved in favor of the grantee in the deed."

A restriction on a lot of ground to continue for eight years provided that no dwelling house erected thereon "shall contain more than two tenants or be constructed for more than two families." Held, that the construction of a three-story house containing seventeen rooms, so constructed as to be available for three families, was a violation of the restriction, although the owner did not intend to use the building for more than two families until the expiration of the eight years for which the restriction was to run. *Ivarson v. Mulvey*, 179 Mass. 141, 60 N. E. 477 (1901).

A restriction against the erection of any "tenement house,—not meaning, however, what is known as a flat or apartment house, provided that they be equal" to a specified class, was held to be a covenant against construction, and not against use. Hence, if the building erected did not violate the restriction, it could be put to any use. *Longworth v. Deane*, 15 N. Y. App. Div. 461, 44 N. Y. Supp. 433 (1897).

§ 230. Restriction as to erection violated by alteration.

In actions to enforce observance of restrictive covenants the intention of the parties is controlling, and no attempted evasion of the provisions of the restrictions will be allowed, although it does not constitute a violation of the strict letter of the covenant.

Thus, a covenant not to erect any buildings "except private dwellings for the use of one family only," cannot be evaded by originally erecting a private dwelling for the use of only

one family, and thereafter altering it for the use and occupancy by two families. *Walker v. McNulty*, 19 N. Y. Misc. 701, 45 N. Y. Supp. 42 (1897). "The position that if the house be originally built as a private dwelling for the use of only one family, it may, consistently with an honest observance with the covenant, be afterwards altered for use and occupancy by two families, is not to be maintained in a court of equity."

§ 231. What land affected by restrictions.—Below high water mark.—Accretion.

The tenants in common of a tract of land bordering on the ocean, partitioned it by deed, in which they agreed that no house or place should thereafter be erected on any part of the land for the sale of intoxicating liquors. Held, that all the land described in the deed, and all below high water mark to which the parties to the deed could claim any rights as riparian owners, was affected by the restriction, so that a grantee of one of the parties could not maintain the place built on piles over the water where liquor was sold. *Silberman v. Mayer*, 48 N. Y. Misc. 468, 96 N. Y. Supp. 928 (1905), affirmed in 116 N. Y. App. Div. 869, 102 N. Y. Supp. 299 (1907). "It would entirely defeat the purpose of the original covenants, if it were possible for the grantees of the persons named in the said deeds, by erecting buildings and structures of various kinds below the high water mark, to entirely change and destroy the character of the restricted territory and deprive the persons resident therein of the advantages sought to be conferred upon them by such covenants."

Where land bordering on the ocean is conveyed with restrictions regarding its use, subsequent addition to the land by way of accretion is bound by such restrictions. *Levy v. Halcyon Casino Hotel Co.*, 45 N. Y. Misc. 289, 92 N. Y. Supp. 231 (1904).

§ 231½. "Fronting."

An L shaped lot located on the corner of Twelfth and Garden streets was conveyed subject to a restriction that no other

than a brick or stone dwelling house not less than three stories in height should be erected on the land fronting on Twelfth street. When the conveyance was made the entire frontage on Garden street was occupied by a store building. In the rear of the store was a vacant portion separable into a back yard for the store and a building lot on Twelfth street. It was contended that there was a corner lot on Garden street 25 by 75 feet, and a lot on Twelfth street 25 by 50 feet, and that as so laid out the city had adopted and taxed it. However, the whole was conveyed subject to the restriction in question as one piece of property. Held, that as, at the time of the conveyance, the entire frontage on Garden street was occupied by a business building, the frontage on Twelfth street referred to in the covenant included the entire vacant portion of the tract, and the erection of a business building on any part thereof would be enjoined. *Catoggio v. Rehm*, ... N. J. Eq. ..., 90 Atl. 1047 (1914).

Restrictions imposed under a general plan of improvement prohibiting the erection of any building on any of the lots conveyed within twelve feet of the lot line fronting the street, or within four feet of the side lines of the lots, were held not to require lot owners to erect their buildings with the façades exposed to the street upon which the lots fronted. *Henderson v. Champion*, ... N. J. Eq. ..., 91 Atl. 332 (1914).

§ 232. Building to "front" on certain street.—Front property line.

Complainant purchased a lot fronting on Wildwood avenue and in the deed covenanted that the building to be erected thereon should "be so located that the front line thereof shall not be nearer than sixty feet to the street line measured at right angles thereto." The grantor covenanted that he would "not convey any of the adjoining lots except by deed containing the same restriction as above recited." Defendant purchased from the same grantor two lots at the corner of Wildwood avenue and Park street fronting on Park street, and which abutted on the rear of complainant's lot. In an action to restrain defendant from erecting a building nearer than sixty feet to Wildwood avenue, the chancellor laid down the

rule that where lots adjoining a certain street are restricted with reference to the erection of any building with regard to the front line of the property, a corner lot, in reality facing on a cross street, comes within such terms, and any building erected thereon must be erected in accordance with the restriction referring to the other street; in other words, the side of the lot is considered in such a case as the front line thereof. *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982 (1912).

This decision, however, was reversed in the higher court on the ground that the intention of the parties was not so clear and certain that equity would aid in the enforcement of the covenant. In the restriction referred to the pertinent part was that the building to be erected on the land should "be so located that the front line thereof shall not be nearer than sixty feet to the street line measured at right angles thereto." A reference to the description of the property and the recorded map thereof plainly showed that the street line referred to was that upon which the property fronted. The map showed that defendant's lot fronted on Park street, and the complainant knew that they so fronted. In reversing the decision of the lower court the court of error and appeals said: "It seems to us that the restriction cannot be construed to forbid the erection of a house on defendant's lot within sixty feet of Wildwood avenue without doing violence to the plain meaning of common English words. The language under consideration refers to the relative positions of the front line of the house and the street line, without naming the street. The words 'the street line,' used in complainant's deed, mean the Wildwood avenue line; but both parties to the covenant knew that any house to be built upon the corner lot would have a front facing Park street, and that a covenant regulating the distance of that front line from the street should relate only to Park street. The vice chancellor solves this difficulty by applying the restriction to Wildwood avenue and to the *side* of the house which is toward Wildwood avenue. That seems to give no consideration to the ordinary meaning of the words 'the front line of the house.' His language is: 'If the same restrictions as to distance of the front line from Wildwood avenue are to apply, then no part of *this front line*

can be nearer than sixty feet, and this without regard to the street on which the house itself on the corner lot may front. Complainant's deed would not, as I take it, prevent his building a house on his lot which fronted toward Park street, but no part of the line of his dwelling which fronts toward Wildwood avenue can be nearer than sixty feet. For the purpose of the covenant the line of the dwelling *fronting* towards the street from which the measurements are to be taken is to be considered as the *front line* intended by the covenant, although this line might be in fact the side line of the dwelling.'

"In this quotation it will be observed that the words 'front' and 'front line' are used in two distinct senses. When he speaks of a house which fronts toward Park street, he uses the word in its correct and only sense. When he speaks of the *side* line of the house as *fronting* toward Wildwood avenue, he uses the word in a sense which, we believe, cannot be justified. Every man knows in an instant what is meant by the 'front line' of a house. It is not the 'side line'; and in order to make this covenant what the court of chancery says it means the language must be radically changed. The word 'side' may be used in a generic sense so as to include the 'front,' but it also has a specific meaning, which distinguishes it from 'front.' The word 'front' as applied to a house is always specific.

"We are, therefore, inclined to think that the plain meaning of the additional restriction which was inserted in complainant's deed at his insistence was that the purchasers of land fronting on streets other than Wildwood avenue should not be permitted to erect buildings on those lots nearer to the line of the street on which they fronted than sixty feet. It is to be remembered that there were two lots abutting on complainant's tract and fronting on Park street. Each of them was one hundred and twelve feet and nine inches in front and a little less on the rear. It would, of course, be impossible for the purchaser of the interior lot (if his purchase was restricted to that lot) to put a house on it nearer than one hundred and twelve feet from Wildwood avenue. If it was intended to affect the purchaser of the corner lot which had its side line

on Wildwood avenue, he would be compelled to build his house entirely on the southerly half of his lot. So that both the natural construction of the language and the situation of the several lots would lead anybody contemplating purchasing either one of the Park street lots, and who was familiar with the restriction in the complainant's deed, to believe that its purpose was to require buildings to be sixty feet back from Park street. So construed, the defendant has not violated the covenant, for, as we have seen, her dwelling house was located seventy-five feet back from Park street. But even if this is not perfectly clear it certainly cannot be said that the construction contended for by the complainant is any more certain, particularly in view of the fact that it is entirely settled that every doubt and ambiguity in the language of a covenant restricting an owner's use of his property must be resolved in favor of the owner's right." *Howland v. Andrus*, 81 N. J. Eq. 175, 86 Atl. 391 (1913), reversing 80 N. J. Eq. 276, 83 Atl. 982.

Where lots were conveyed subject to restrictions that no buildings shall be erected within twenty feet of the front property line of any street, the words "front property line" were held to refer, in case of a corner lot, to the line of the street on the side of the lot, as well as the line of the street on which the lots faced. *Waters v. Collins*, ... N. J. Eq. ..., 70 Atl. 984 (1895).

The reasoning of the court in this case was as follows: "The argument upon this point is to this effect: That the plan of lots upon the map filed by the Chelsea Beach Company displays complainant's lot fronting on Atlantic avenue, with its south side on Montpelier avenue; that the language of the restriction is that no building shall be erected within twenty feet of the front property line of any street or avenue; that the present structure is not upon the front property line, but is upon the side property line of Montpelier avenue. At the argument I was impressed with this view of the scope of the restriction. But a more deliberate examination has convinced me that this is not the meaning to be extracted from the language of the clause. The object of the clause was to preserve an uninterrupted view throughout the length of the

street, and this could not be effected if the corner buildings were placed within five feet of the side street line, although all the remaining buildings in the block should be kept the limited distance. And it is perceived that, if this construction of the twenty foot limitation does not apply to this corner lot, it does not apply to any corner lot; and therefore the view from the thoroughfare to the ocean on each of the four avenues could be intercepted at each corner. A distinction drawn between the two restrictions, the twenty feet and the five feet restrictions, is a distinction between boundaries by other lots and boundaries by street lines. Now a lot fronts on a street when it lies face to face with or opposite to, a street. The front property line of any street is the boundary which delimits private property lying along that street from the street itself. Both at Atlantic avenue and Montpelier avenue this condition of affairs exists. There is, therefore, on both streets, a front property line of defendant's lot."

§ 233. — where building has two "fronts" or front entrances.

A covenant in a lease that any house on the premises, or that may be placed thereon, shall at all times front on a certain park, was held not to be broken by the construction of an addition to a building, which was on the premises when the lease was made, fronting on a side street, so as to give the building two fronts. *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076 (1896).

"It certainly can not be said, from the evidence in this case," said the court, in referring to the building, "that it does not front on the park, and, in our view of the proper and legal construction of the covenant claimed to have been violated, it is immaterial whether it also fronted on Fifty-first street or not. Whether the building as it now stands is in good taste, makes an attractive appearance, or otherwise, is also immaterial, unless it could be said that such a result arose from an attempt, on the part of appellee, to evade the spirit of her covenants as to fronting the house on the park,— and of this there is no evidence. It is certainly desirable that a building located as this is, extending near both the street and

the park, shall be so constructed as to present an attractive appearance from either direction. . . . The covenant in the lease is not that a building of any particular style of architecture shall be built on the lot, attractive in appearance, etc., but simply that it shall front in a particular direction."

An apartment house with a vertical dividing wall extending the whole height of the building with seven or eight apartments on each side, with entrance to all the apartments except one on the same street, cannot be said to front on the street on which the one entrance alone is made to front. *Holden v. Ryan*, 22 Ont. Wkly. Rep. 767, 3 Ont. Wkly. N. 1585, 4 D. L. R. 151 (1912).

§ 234. Implication that building should front on certain street.

The owner of two lots, located on opposite sides of the same (Eighth) avenue, conveyed one, and at the same time he and the purchaser made a mutual agreement not to erect on the respective lots any building except stone or brick dwelling houses of at least three stories in height. The lot sold also faced on Plaza street. Held, that no implication could arise from the agreement that the houses to be erected on the latter lot must face Eighth avenue. *Gubbins v. Peterson*, 21 N. Y. App. Div. 241, 47 N. Y. Supp. 685 (1897), affirmed in 163 N. Y. 583, 57 N. E. 1111 (1900).

"The frontage of a house on Plaza street," said the court, "instead of putting the front on the avenue, was not so clearly contrary to all reason and judgment as to necessarily raise the implication that the covenant was intended to permit the latter only. There is no ambiguity in the phraseology of the agreement, presenting any question of doubtful meaning. And it is a well settled proposition that restrictions upon title taken by grant will not, as against the grantee, be extended beyond those which the instrument creating them, by its terms or by necessary implication, imports. It is true that the qualified use of the premises by the defendant was made appurtenant to them by the common grantor of the parties, for the benefit of the plaintiff, in his relation to the property purchased by him. And it may be that he had in view the

frontage on Eighth avenue of any house which should be erected on the premises which were afterwards conveyed to the defendant. But his expectation or understanding in that respect, whatever it may have been, cannot enlarge the import of the covenant, as against the defendant, who, so far as relates to its restrictive provisions, must be deemed to have purchased in reference only to its terms, and with a view to the interpretation of which they were fairly susceptible. Nothing appears in the evidence to characterize the united intent of the parties in making the agreement, other than such as the language employed expresses it. It is not seen that the fact that the premises are described in maps in the city departments, and upon the assessment rolls, as upon Eighth avenue, has any essential bearing upon the question arising upon the covenant. They do not qualify the fact that the land is bounded by the two streets. It cannot be assumed that the rear of any dwelling house will be so constructed upon the premises as to render it or its use a nuisance. It certainly may not, nor will the premises thereby necessarily be made so in their relation to the street in the rear of them, and therefore no such question is now here for consideration."

§ 235. Restriction referring to front of dwelling does not apply to side entrance.

Action was brought seeking to enjoin the maintenance by defendant of a main entrance to his dwelling on the side of his house under covenants relating to the height of the finished grade "at the front line of the house," without terrace or step between the street sidewalk "and the front line or lines of house;" and one providing that no fence or hedge should be erected "nearer the street line or lines than the front wall or walls of the house."

In holding that plaintiff was not entitled to an injunction, the court said: "These covenants certainly restrict the grading and the front lot surface between the house and the street. They may conduce to the effect of a broader street vista, unbroken by projecting fences or banks of varying heights. But it is not clear that a house which otherwise conformed to the site requirements may not legally have a side entrance.

An adequate approach and side entrance along this five-foot strip at the northern side may present serious architectural problems, indeed difficulties such as perhaps may require modification of the present design. Where, however, such an entrance restriction is not express, and does not arise by clear implication, the court cannot read into a conveyance such an additional limitation on the right to build going beyond those express restrictions so comprehensively elaborated." *Thompson v. Diller*, 146 N. Y. Supp. 438 (1914).

§ 236. "Street" and "street line" synonymous.

A restrictive covenant provided that during a period of twenty years "no residence or part thereof inclusive of porches shall be erected on any of said lots within forty feet of the street line upon which the lots so improved front, nor within forty feet of any side street." It was held that no distinction between the words "street line" as applied to the front of the lot, and the word "street" as applied to the side of the lot in question could be drawn; that both applied to the streets as shown on a plat of the property, and therefore meant the street in its broadest and most general sense, that is, from the property line to the property line, and that the buildings must be erected in reference thereto. *Yeomans v. Herrick*, ... Mo. App. 165 S. W. 1112 (1914).

§ 237. "Street line" has reference to line existing when restriction was made.

A restriction against buildings within a specified distance of a street has reference to the line of the street as it existed at the date of the instrument, and it cannot be affected by the subsequent widening or narrowing of the street by public authority, or by the fact whether a building is erected before or after such alteration of the line. *Tobey v. Moore*, 130 Mass. 448 (1881). But see *McDonald v. Spang*, 55 N. Y. Misc. 332, 105 N. Y. Supp. 617 (1907).

§ 238. Building to cover entire front of lot.

Agreement to build three or more dwelling houses, covering the entire front of certain lots, of such character and descrip-

tion as to be ineligible for tenement houses, or for any trade or occupation likely to be offensive or injurious to parties to the agreement owning land adjoining the rear of such lots. Held, that the erection of four dwelling houses on the lots covering the entire front thereof except that one of them was built with a carriage-way or passage, unconnected with the house, but opening on the street, and leading to the rear of the lot, so that stables or other buildings might have been erected, having a common entrance and exit by the carriage-way, on the rear of each lot, was a breach of the agreement. *Voorhies v. Anthon*, 12 N. Y. Super. Ct. (5 Duer) 178 (1855).

It was said by the court: "The possible appropriation of the vacant lots to purposes which might prove an annoyance or injury to the premises on Twenty-first street, was the inducement or motive to the arrangement, and the prevention of such an appropriation was the object which the owners of those buildings (the parties to the agreement of the first part) intended to secure. They accordingly provided in their agreement with the plaintiff, that the vacant lots in question when purchased by the plaintiff, and also the westerly lot adjoining, then owned by him, should be improved by the erection of buildings thereon, of a class equal, in appearance, to their own, and covering the entire front of the lots, and so constructed as to be ineligible for any trade or occupation likely to be offensive or injurious to their own property.

"The instrument does not, in terms, designate any particular occupation as offensive or injurious, except tenement houses, but as that particular is followed by the general clause in question, it is manifest that the parties understood each other, as excluding all modes of occupation which would have the effect to injure the value of the property of the owners on Twenty-first street—the buildings to be erected were not only, within the spirit and true meaning of the agreement, not to be built for such offensive purposes, but they were to be so constructed as to be 'ineligible' therefor; the instrument thus guarding, as much as possible, against the possibility of the appropriation of the premises to any such use.

"It may even be conceded (though I do not so concede) that the covenant is complied with, on the part of the plaintiff, in

so far as the stipulation to cover the entire front of the vacant lots is concerned, but this would not answer the whole condition of the stipulation. By constructing a carriage-way through the whole depth of the westerly building, leading from the street to the yard, the plaintiff has shown an intention to reserve to himself, and has, in fact, reserved to himself the facility to connecting with that building, as a means of its greater enjoyment, some other building, to be constructed in the rear; and that he himself considered the carriage-way as a means by which the premises might be converted into a nuisance, is evident, from the fact, that, when remonstrated with for having constructed it, he threatened, that, if the parties to the agreement did not pay him what they had stipulated, 'he would put up a factory in the rear, or something else, to annoy them.' To say, in the face of this, that a building so constructed is ineligible for any occupation likely to be offensive or injurious to the owners on Twenty-first street, would be doing violence to the common sense of the whole agreement.

"It was not, alone, the construction of buildings in themselves nuisances which was intended to be guarded against, but the construction of buildings which could be converted into nuisances, or which could be used for purposes 'likely to be offensive or injurious.' . . . The obvious and palpable intention of the plaintiff, in constructing this carriage-way, from which there is no entrance into the dwelling house, and which can only be entered itself from the outside, at either end, was to connect it, at some future time, with a stable, to be erected in the rear, and as an appurtenant to the dwelling house. This would be, of itself, 'offensive' to the occupants of the houses in Twenty-first street, and, consequently, 'injurious' to the property; but the plaintiff would not be restricted to this kind of annoyance, since the passage in question would furnish an equally convenient access to a factory, or other offensive establishment. True, he has not yet erected the nuisance, and may never do it, but he has reserved the means to do so, and has himself created the temptation, and manifested the intention to do it, at least to the extent of erecting a stable in the rear. Unless for some

such object, the carriage-way would be utterly useless. As already said, there is no entrance into the dwelling house from it; but it forms a clear and open passage, from front to rear, and is only to be entered from the outside of the building, at either end. Its object is too manifest to allow of a doubt, and we think the construction of this carriage-way a clear violation of the contract."

§ 239. Rear end of lot.

A restriction forbidding the erection of building exceeding nine feet in height "on the rear end of a lot of ground," is violated by the erection of a brick factory five stories high, occupying the entire space of the lot in question and other adjoining lots owned by the same person. In view of the fact that the entire lot is occupied, the words "rear end of the lot" are not indefinite. *Wesley v. Sulzer*, 224 Pa. St. 311, 73 Atl. 338 (1909).

§ 240. Stable as including garage.

A restriction prohibiting the placing of a stable on land, imposed before the time when automobiles came into common use, has been held not to include a garage. *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730 (1911).

This case was decided on the theory that such restriction must be interpreted in the light of the circumstances existing at the time it was imposed, and that the word "stable" must be construed as including only such buildings as were fairly indicated by the word at that time. In reference to this question the court said: "Under this rule of interpretation is this building a stable? In Webster's Dictionary, edition of 1864, a stable is defined as 'a house or building for horses or other beasts'; in Webster's edition of 1903, as 'a house, shed, or building for beasts to lodge and feed in; especially a building or apartment with stalls for horses, as a horse stable, a cow stable'; and in the edition of 1910 in practically the same language; in the Century Dictionary, as 'a building or inclosure in which horses, cattle, and other domestic animals are lodged, and which is furnished with stalls, troughs, racks, and bins to contain their food and necessary equipments; in a

restricted sense, such a building for horses and cows only; on a still narrower, and now the most usual sense, such a building for horses only'; in the Standard Dictionary, edition of 1895, as a 'building or part of a building set apart for lodging and feeding horses or cattle; especially one fitted with stalls, fastenings, etc.; also often for storing hay or putting up vehicles; sometimes specifically carriage stable, cow stable, etc.' In 36 Cyc., page 812, and in 26 Am. & Eng. Ency. of Law, page 154, it is defined as a 'house, shed or building for beasts to lodge and feed in.' While it is true, as stated by the plaintiffs, that in the Standard Dictionary, editions of 1895 and 1908, a stable is defined as a building often used for putting up vehicles, and that in the Standard and Century Dictionaries a garage is defined as 'a stable for motor cars' and 'a building, as a stable, for the storing of automobiles or other horseless vehicles,' we nevertheless think that the word 'stable' as commonly used and understood at the time the imposition of those restrictions, especially when contrasted with other buildings usually appurtenant to a dwelling house, carried the idea of not only a building, but also the presence of domestic animals like horses or cattle as its occupants, and that such is the meaning of this word in the restriction. Accordingly it must be held that the building is not a stable within the meaning of the restriction. And this is so even if, as argued by the plaintiffs, a garage is as objectionable as a stable."

§ 241. Hospital as dangerous to neighboring inhabitants.

A restriction in a deed that "no tenement house, livery, or other stable, slaughter house, butcher or smith shop, forge, steam engine, foundry, manufactory of metals, glue, varnish, vitriol, turpentine, or ink, or any brewery or distillery, or any other building, trade, or business which may be dangerous, injurious, or offensive to the neighboring inhabitants, shall be built, allowed, or carried on on the above granted premises," is violated by a building on the premises used as a hospital for the care of sick infants, including those who develop, after admission, contagious disease. *Gilford v. Babies' Hospital*, 1 N. Y. Supp. 448, 21 Abb. N. C. 159 (1888).

"In my opinion," said the court, "the hospital is not a nuisance *prima facie*. While not within that class, there are general features inseparable from its maintenance proper for consideration upon the contention of its being shown a nuisance from the way of management. In these are included the noise of patients, their advent, removal, and death, with its consequences. From the evidence appears the reasonable probability of contagious disease, provided for by a wise provision, although limited to cases to develop after reception. While this may diminish the number, it does not remove the important factor. The locality is shown wholly devoted to private residences, until this most laudable undertaking selected the house for its accomplishment. . . . To my mind the hospital is not a reasonable use of property, considering the locality and surroundings. The care of sick infants, so to speak, in gross, brings danger to the youthful members of families living near. The aggregation multiplies the risk of ordinary existence, whatever may be the degree of care taken. Who would willingly submit his child to such chance? and, not being called upon to do so by the necessities of ordinary life, the imposition becomes an invasion of right."

§ 242. Occupancy by only one family.—Hospital operating room.

A restriction that no building on the land in question "shall be used as an apartment house, family hotel or flats, or in design or construction be fitted for occupancy for more than one family," was held not to be violated by the use of one of the rooms of a dwelling house thereon as an operating room for a hospital, the internal structure of the building being still fitted for occupancy for only one family. *Carr v. Riley*, 198 Mass. 70, 84 N. E. 426 (1908).

§ 243. Bough house.—Pavilion.

Lands bordering on the ocean were conveyed with a restriction that there should not thereafter be built, erected or moved, any building or structure east of a designated line, and that the grantee would not suffer anything to be done which would in any wise obstruct or interfere with the view

or prospect from the adjoining hotel of the grantor across that part of the lot, but that the grantee might erect any bough house on the margin of the ocean bank, or any bath house at the foot of the bank or bluff. It was held that the construction of a pavilion along the entire ocean front of the lot constituted a violation of the restriction, both from its extent and obstruction of the view, although it was of no greater height than a bough house. *Gawtry v. Leland*, 31 N. J. Eq. 385 (1879).

In this case the court said: "The building is what is known as a pavilion, extends along the whole front of the stokes lot and is intended to be permanent. The covenant provides against the erection of any building or structure on that part of the lot, except a single bough house, which is understood to be a rustic summer house of but small dimensions, constructed in part of the boughs of trees, and intended merely to furnish a seat for a few persons, in the shade, on the bank of the ocean. If it were to be held that, in character, the pavilion is substantially the same as a bough house, yet, by its extent, it would be a violation of the covenant. It is obvious that it was the intention of the parties to stipulate that the ocean front of the lot should be kept free from everything which could, in any way, to any considerable extent, obstruct the view of the ocean over it from the Mansion House. It was manifestly not within their intention to authorize the construction of a building which, though not higher than a bough house, or in its construction more obstructive of the view than such a house of the same extent would be, would extend along the entire front of the lot. It is not to be forgotten that the covenant expressly provides against any building or structure except a bough house. A reasonable construction will be given to the covenant; one in accordance with the intention of the parties."

§ 244. Against removal of building.—Alteration.

In the construction of covenants relating to the removal of buildings from leased premises, as in the construction of all covenants, the circumstances and conditions surrounding the parties and property must be taken into consideration.

A covenant in a lease that buildings upon the premises shall in no case be removed therefrom and shall be kept in repair, is not broken by an alteration and improvement of the building that increases the security to the lessor. *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076 (1896). The court said: "The manifest object of the parties in putting these covenants in the lease was to protect the lessor against loss resulting from permitting the property to go into decay or to be removed from the premises. It can scarcely be seriously contended that it was expected that a building of the description of the one on the lots in 1874 should be maintained during the whole period of ninety-five years. In fact, the evidence shows that at the time the improvements were made thereon they were necessary to prevent its becoming unsafe as a residence and falling into decay. That injury or danger of loss to the lessor was occasioned by the change is not pretended. More than double the security which the lessor had in the old building was furnished by the improvement made on it. There was no violation of the covenant in the lease by 'pulling down' or destroying or removing the house."

§ 245. Land for college campus.—Oil well.

A restrictive covenant in a deed to land intended for a college campus, providing that it shall be devoted exclusively to the purposes of the campus, and that no buildings shall be erected thereon except those devoted to university purposes, is not violated by bringing upon the land lumber, tools, sheds, derricks, engines and oil tanks for the purpose of drilling for oil beneath the surface, where such occupation will probably be of a temporary character, and even if oil be found, the general purposes of the grant may be materially advanced by the pecuniary results therefrom. *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262 (1901).

§ 246. Covenants relating to ways.

The grant of a way which "shall not be subject to have any fence or building erected thereon," excludes the erection of any building above the ground or overhanging the way,

although there is room enough left for the uses to which the way was intended to be put. *Schworer v. Boylston Market Assn.*, 99 Mass. 285 (1868).

When the exact dimensions of a reserved way are unexpressed, but the object of the reservation are expressed, the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object. *Atkins v. Bordman*, 43 Mass. (2 Metc.) 457, 37 Am. Dec. 100 (1841).

If a grantee accepts a conveyance which provides a way of access for ordinary purposes to the land, but which restricts the right of use, no way of necessity can arise so as to enlarge that right, although the way is not sufficient for all purposes. *Haskell v. Wright*, 23 N. J. Eq. 389 (1873).

"If a rear tenement is conveyed or leased, as is frequently the case, with a right of passage expressed in the deed through an alley-way of four feet wide, it does not give a right to have a way, of necessity, cut through the house or garden on the front of the lot, although the four-foot alley is not sufficient to pass a cart, or for many other purposes for which a way is usually needed." *Haskell v. Wright*, 23 N. J. Eq. 389 (1873).

§ 247. Covenants relating to rights of light and air.

The owners of adjoining lots entered into an agreement to maintain a private alley described therein, and mutually granted to each other a permanent easement in the alley "to the end that they may have light and air from and over said strip," and have the permanent use thereof as a passageway for themselves, their tenants, successors, assigns and legal representatives. It was held that the erection of a smoke stack and oriel windows constituted a violation of such agreement. *St. Louis Safe Deposit & Savings Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S. W. 474 (1903).

Land conveyed by deed was bounded therein on the end of "a passageway of five feet wide in the clear for light and air," and it was provided that "the passageway for light and air is to be five feet wide on" the grantee's line, and two feet eight inches on the lane to which it ran, "and the same is always to be kept open for the purpose aforesaid," and the

grantee, his heirs and assigns, to have no other privilege in the same. Subsequently the grantor who owned the fee in such passageway, conveyed to the grantee the right to have his line run four inches further on said passage. It was held that the grantee had a right to the open and unobstructed passage of light and air from the ground upward, and throughout the length of the passageway. *Brooks v. Reynolds*, 106 Mass. 31 (1870).

A, the owner of land, covenanted with the owners of adjoining estates, between whose estates and the estate of A was a brick wall, that neither he nor his heirs and assigns "shall or will ever carry or cause to be carried any higher than the same now is, the brick wall which separates" the estates, "and in case the wall now there should be destroyed, injured, or taken down, that no wall or anything else to obstruct in the least degree the light or air shall ever be there erected higher than ten feet." Held, to prohibit the erection by A's grantee of anything next to the present wall which would obstruct light or air more than the wall, or such other wall as was described, would obstruct either. *Chase v. Walker*, 167 Mass. 293, 45 N. E. 916 (1897).

"It is quite plain," said the court, "that the literal construction which is contended for by the petitioner could not have been in the minds of the parties to the covenant. Under that construction, the covenantor might have at once erected a building or wall directly abutting upon the existing wall, and carried it up as high as he saw fit. Such a construction would lead to an absurd consequence. So far as light and air were concerned, there would have been no practical difference to the covenantees between such a structure and carrying up the existing wall. It cannot be supposed that this covenant was given and received with the intention of restricting Mr. Coolidge and his heirs and assigns from building a higher wall on the space then occupied by the existing wall, but leaving him at liberty to build as high as he pleased just inside that wall.

"The only question then is whether the words of the covenant will admit of a broader meaning. In our opinion they will. The instrument was in effect a grant of an easement;

and the words may be construed with a leaning against the grantor or covenantor, in order to carry out the obvious intention of the parties. That intention was that no wall or anything else should be built to obstruct in the least degree the light or air above the height specified. Looking at the words with reference to this obvious intention, they mean that nothing shall be built on that lot next to the wall to obstruct light or air more than the existing wall, or such other wall as is described, would obstruct them."

§ 248. Covenant to keep land for common benefit or to keep land open.

A deed of conveyance to land contained an agreement that certain land described therein, and which adjoined the land conveyed and also land that the grantor retained, should "never be hereafter sold, but to be left for the common benefit of both parties and their successors." Subsequently a house was erected on such land, and in an action to compel the removal of such house as being in violation of the agreement, it was held that the agreement did not amount to a perpetual restriction of sale, but was an agreement to leave the land in the state in which it was at the time of the conveyance, and that it contemplated, not an uncertain and indefinite use of the land by the parties, but that the land should be left open for the advantage of the parties as adjoining proprietors. *McLean v. McKay*, L. R. 5 C. P. 327, 29 L. T. Rep. 352, 21 Wkly. Rep. 798 (1873).

In construing this agreement the court said: "The clause uses no technical words. It is written in popular language which unskilled men would employ; and reading the language in its ordinary and natural sense, the intention of the parties to be collected from it apparently is, that the space described should remain as it was. Of course, by agreement, the subsequent use and enjoyment of it might be in any way arranged between them; but, as far as the legal obligation of this deed went, the restriction amounted to no more than an agreement on the part of Mr. Forbes, who was to retain the ownership of the land, to leave it in the state in which it was. It was suggested that the agreement was not one which equity would

enforce, because it was not declared to be for the benefit of the land which the appellant has. Undoubtedly the clause does not say in terms that the ground is to remain open for the benefit of the land which McIntosh had bought, but really that must be implied. There could be no object in stipulating that it should be left open for the benefit of both parties, unless it meant for the benefit of both parties as owners of the lands which adjoined the plot. Therefore the implication is natural and irresistible, that when the parties speak of leaving this piece of land open for the common benefit of both, they meant for the common benefit of both as holders of the adjoining lands. Undoubtedly if the true construction of this clause had been that the parties meant that there should be a common use of the plot, and a common partaking of the profits in some undefined way, that would be an indefinite and uncertain agreement relating to land which it would not be possible for the court to enforce; but construing this clause as an agreement to leave the land open for the advantage of the two adjoining proprietors."

A covenant to keep a strip of land open as a public street forever is a covenant not to build thereon. *Story v. New York Elevated R. Co.*, 90 N. Y. 122, 170 (1882).

§ 249. Covenant not to build with entrance or way to buildings in rear.

A covenant not to erect or permit the erection of "any building which shall contain an alley or entrance running through it for ingress or egress to rear buildings," does not prohibit the purchaser, who erected a hotel on the lot, from having a driveway along the rear of the premises in order to afford access for deliveries of supplies for the hotel. *Leonard v. Hotel Majestic Co.*, 17 N. Y. Misc. 229, 40 N. Y. Supp. 1044 (1896).

"This covenant," said the court, "evidently referred to driveways to tenement houses, stables, or business structures from the street to the rear of the buildings in front, for common use by different persons. The driveway through from one street to the other is not within the verbiage, nor is an opening for an alley or entrance to an interior part of a single

structure. The construction claimed by the plaintiff would prohibit an entrance one hundred feet away from the plaintiff's building, as well as one adjoining his residence. The application of the restriction cannot be sustained."

§ 250. Covenant to build on every third lot.

If a purchaser of lots agrees to build, within a limited time, a house on every third lot purchased, or in that proportion, and he receives conveyances for the greater part of the lots, he is not bound to build in proportion to the lots conveyed unless the whole number is conveyed. *Pratt v. Law*, 13 U. S. (9 Cranch) 456, 3 L. Ed. 791 (1815). Here it is seen that the purchaser was not restricted as to the specific lots on which the buildings were to be erected. His choice, therefore, extended over the whole, and the obligation was not complete until the whole land was conveyed to him.

§ 251. Covenant to build; time for performance.

A covenant requiring the grantee to build a certain kind of house, but which does not specify the time within which the building must be completed, must be performed within a reasonable time. *Hurley v. Brown*, 44 N. Y. App. Div. 480, 60 N. Y. Supp. 846 (1899).

§ 252. Second and third stories extending over building line.

A restrictive covenant that no house shall be built on the land in question unless placed back a distance of fifteen feet from the street line, is violated by a building the first story of which extends only to the line, but the second story of which projects two feet beyond the first story, and the third story extends two feet nine inches beyond the second story. *Righter v. Winters*, 68 N. J. Eq. 252, 59 Atl. 770 (1905).

§ 253. Alterations "in" a building.

Plaintiff was the lessee of premises on which, and covering the entire lot, was a five-story building. He leased the first story of the building to the defendant and in the lease the latter covenanted not to "make any alterations therein without the written consent of the party of the first part." Defendant proceeded to erect a wooden awning supported by

posts and attached to the building by means of a cleat screwed to the outer walls, and plaintiff filed suit to enjoin him on the theory that his acts constituted an alteration "in" the building. It was contended by the defendant that the alterations being on the outside of the building, did not constitute an alteration in the premises. The court, however, held to the contrary, the following being taken from its opinion in the case: "The covenant alleged to have been broken is, that the defendant will not make any alterations *in* the demised premises; and it is claimed that the erection of the shed, being outside the building, is not an alteration *in* the building. But I think that too narrow a construction of the covenant. It appears that the structure rests upon and is secured to a cleat fastened or screwed to the front of the building running along its entire front and side, and forming partly the support to the shed. To sustain this cleat, screws have necessarily been inserted into the front of the building, and to that extent, taken in a literal sense, it is an alteration *in* the building. But I think 'in' is to be taken as including *upon* as well; so that the covenant may read, 'alteration in or upon,' and cover the erection which the defendant has annexed to it. Such undoubtedly was the intention of the parties; otherwise, any alteration of the exterior of the building would be no breach; and the tenant could remove the entire front of his store, and work serious injury to the building under claim that it was not an alteration 'in' the building. The fair construction of the covenant, therefore, is that the lessee shall not make any alterations *of* the premises, so as in any respect to change them from the condition they were in when he made his covenant, without first obtaining the consent of his landlord. Such a covenant is reasonable and proper. It is for the protection of the owner against any nuisance by his tenant and in aid of his remedies for injury to his property." *Trenor v. Jackson*, 15 Abb. Pr. N. S. (N. Y.) 115 (1873).

§ 254. Covenant to sell one kind of beer.—Duty of covenantee to supply at reasonable price.

Where a lessee covenants not to sell any beer on the demised premises except it be purchased from the lessor, it imports an

implied covenant on the part of the lessor to supply beer of good quality at fair and reasonable prices. And where the lessor increases the price to the lessee during the term of the lease, whether or not the lessee is obliged to pay the increased rate depends upon whether such increase in the price is reasonable. *Courage & Co. v. Carpenter* (1910), 1 Ch. 262.

It has been held that such a price does not mean the lowest possible market price, but a reasonable price under the circumstances. Where the lessor increased the price of beer one shilling a barrel in consequence of a war tax in the same amount being imposed on the manufacture of beer, it was held that the tenant was bound to pay the increase, because it was reasonable in the circumstances. *Noakes & Co. v. Day*, (1910) 1 Ch. 270.

§ 255. Covenant not to grub up trees.—Resetting.

A covenant in a lease on the part of the lessee not to remove or grub up trees was held to be broken by removing trees from one part of the premises to another; and also by taking away trees, even if the lessee plant a greater number than he takes away, unless those taken away were dead. *Doe v. Bird*, 6 Car. & P. 195, 4 Nev. & M. 285, 4 L. J. K. B. 52 (1833).

§ 256. Not to plow pasture land.—What land included.

A covenant on the part of the lessee of a farm not to plow up pasture land has reference solely to land which was pasture land at the date of the agreement, and does not refer to land which the tenant subsequently leaves for a considerable period of time in grass. *Rush v. Lucas*, 54 Sol. Jo. 200, (1910) 1 Ch. 437.

§ 257. Against land vesting in person of African descent.—Corporation.

A corporation is a distinct existence separate from that of its stockholders and directors. Hence, a conveyance to the corporation is not in violation of a restrictive covenant merely because a conveyance to some or any one of its stockholders would be.

The lots in a subdivision were conveyed with a restrictive

covenant providing that the title to the land should never vest in a person of African descent or colored person. Some of the lots were thereafter conveyed to a corporation composed of negroes which acquired the land for the purpose of establishing an amusement park for colored people. In an action to cancel the deed to the corporation and enjoin the sale it was held that such conveyance was not in violation of the restriction, as the corporation, although composed of colored persons, was not a "colored person" within the meaning of the restriction. *People's Pleasure Park v. Rohleder*, 109 Va. 439, 61 S. E. 794 (1908).

"Such a conveyance," said the court, "by no rule of construction, vests the title to the property conveyed in 'a person or persons of African descent.' Although a copy of the charter of the grantee is filed as an exhibit with the bill and made a part thereof, and which sets out that the object for which the corporation is formed is 'to establish and develop a pleasure park for the amusement of colored people,' a contemplated sale of the property to 'a person or persons of African descent' is not even alleged, only a contemplated use of the property as a place of amusement for colored persons, which the restriction relied on neither expressly, nor by implication, prohibits."

§ 258. Covenant relating to deed to land does not include a lease.

A covenant on the part of the owners of a tract of land provided as follows: "Said first parties hereby further agree that they will in and by any deed hereafter executed by them or either of them for any part of said 'La Tourette's Second Addition' to said town of Cleveland prohibit any drilling for oil or gas on any land so hereafter conveyed in said 'Second Addition.'" Held, that the use of the word "deed" in the restriction did not include "lease," and that the first parties to said covenant were at liberty to lease said property for the purpose of drilling oil and gas wells thereon. *Test Oil Co. v. La Tourette*, 19 Okl. 214, 91 Pac. 1025 (1907).

"It is conceded," said the court, "that there has been no conveyance by deed of any portion of Second Addition to

defendants herein, but that their right to drill wells thereon is by virtue of the terms and conditions of an oil and gas lease from La Tourette and wife to F. W. Lawrence, similar in form to the lease of plaintiff. Numerous authorities are cited by counsel as supporting their contention that the term 'deed' in the restrictive clause should be construed to prohibit by 'lease.' Under various statutes, and within its generic sense, the courts have frequently held that the term 'deed' included a mortgage, bond, will, and other instruments in writing under seal; but the term 'deed' is more frequently used, however, in a more limited sense as meaning a written instrument duly acknowledged by competent parties conveying the title in land. A stipulation to give a deed to land contracted to be sold would certainly not be fulfilled by the delivery of a lease. . . . The common usage and acceptance of the term 'deed' undoubtedly means a conveyance of real estate, and that was the sense in which it was used in plaintiff's lease. Said first parties agree that they will in and by any deed hereafter executed prohibit any drilling for oil or gas on any land so hereafter conveyed in said Second Addition, is the substantial language of the clause. Conveyed in what manner? By 'deed,' not by 'lease.' "

CHAPTER VIII

ACTIONS TO ENFORCE OBSERVANCE, OR FOR BREACH, OF RESTRICTIONS, AND THEIR INCIDENTS.

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§ 259. Jurisdiction of equity in general.

A court of equity will enforce by injunction the observance of restrictive covenants relating to real property, though they do not, in law, constitute easements or covenants running with the land. But the jurisdiction is discretionary, to some extent, and the right to invoke relief by injunction in such cases is not absolute. It is governed by the same general principles which control the jurisdiction to compel specific performance of contracts. Where a proper case for its exercise is shown, relief is granted as a matter of course, but if, under the conditions and circumstances obtaining, the granting of the relief sought would work injustice or be ineffectual of any meritorious result, it will be refused. *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027 (1905).

In determining whether or not it should, in its discretion, enjoin the doing of a thing which is alleged to constitute a violation of restrictive covenants, a court of equity will consider whether the injury which it is asked to restrain is an injury which if done cannot be remedied; that whether, if done, it can or cannot be sufficiently atoned for by the payment of a sum of money in damages, and whether those damages must be sought in successive suits, or could be obtained once for all. *Doherty v. Allman*, L. R. 3 App. Cas. 709 (1878).

Restrictive covenants will be enforced when the intention is clearly manifested and the enforcement is necessary for the protection of substantial rights. *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84 (1910).

When restrictive covenants are in plain and unmistakable

language they are to be enforced in accordance with their very letter. *Thompson v. Diller*, 146 N. Y. Supp. 438 (1914).

Courts of equity will decree performance of a contract for the sale of land, not because of the particular nature of land, but because the damages at law, which must be calculated upon the general value of land, may not be a complete remedy to the purchaser, to whom the land purchased may have a peculiar and special value. This is the general rule, and all contracts or questions touching the enjoyment of land fall within the principle of this rule. Therefore, courts of equity will restrain nuisances affecting the permanent enjoyment of land, and repeated or continuing trespasses on land, and breach of agreements affecting the use or enjoyment of land. *Bricker v. Grover*, 30 Leg. Int. (Pa.) 380, 10 Phila. 91 (1873).

The fact that equity will refuse to enforce a condition against the sale of intoxicating liquors on premises, which would result in forfeiture of the estate, does not prevent equity from enjoining the breach of such condition. In *Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363 (1885), the court said: "The complainant is not entitled to enforce a forfeiture of the estate in equity, for equity does not aid in enforcing forfeitures. But on the hearing in this court they do not claim a forfeiture, and only ask for the enforcement of the condition as an agreement. This is a remedy much more favorable to the defendants than the remedy of law, for the equitable remedy only compels the party to abide by the agreement, while the remedy at law takes from him the property he has paid for, and operates as a punishment. Injunction then to restrain a breach of a condition, if the condition is legal, is perfectly reasonable."

Equity will not restrain the breach of a restrictive covenant on the ground that the acts complained of are criminal. *Ocean City Association v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914 (1898).

§ 260. — illustrative cases.

A court of equity will enforce by injunction, against subsequent purchasers of land with notice of restrictions imposed

thereon, the observance of such restrictions, and such jurisdiction is not dependent upon the insolvency of the defendant. *Webb v. Robbins*, 77 Ala. 176 (1884).

One who owned land on both sides of a river, across which he operated a ferry, conveyed a portion of the land, but, for the purpose of protecting his ferry from opposition, inserted a provision in the deed that neither the purchaser, nor his heirs or assigns, should establish or authorize the establishment of a common ferry boat landing on the land conveyed, without permission from him. Held, that such provision was binding on the assignees of such grantee, and that a court of equity would enforce observance of the same on behalf of a devisee of the original owner by enjoining the establishment of a ferry landing on such land. *Frye v. Partridge*, 82 Ill. 268 (1876).

Where one conveyed a lot adjoining an alley eight feet wide, and at the time of the conveyance agreed to widen the alley to the width of sixteen feet, which he subsequently did, he will be enjoined from again narrowing the alley to its original width. *Bechtel v. Carslake*, 11 N. J. Eq. 500 (1858).

So, an agreement made by a vendee of real estate not to use the same during his ownership for saloon purposes, may be enforced in equity by injunction. *Taylor v. Becker*, 8 Ohio Dec. 151, 6 Wkly. L. Bul. 25 (1881).

In an action to enforce the observance of a restrictive covenant, it appeared that defendant had covenanted not to erect or cause to be erected a stable on the adjoining lot belonging to him. Plaintiff and defendant had been in business on premises sold by defendant to plaintiff, as keepers of a sale stable. Defendant stated that the lot purchased by him adjoining the plaintiff's property, is so valuable only for a stable. The court said that it may be readily perceived how the erection of a stable on the adjoining lot would affect the value of the plaintiff's property. "But," continued the court, "what would be the measure of damages in such a case it is not so easy to decide. It is enough that it impairs the peculiar use and enjoyment of the property the plaintiff purchased with the covenant that the defendant would not erect a stable

on the adjoining lot, and . . . in such a case a court of chancery always enjoins." *Bricker v. Grover*, 30 Leg. Int. (Pa.) 380, 10 Phila. 91 (1873).

It has been held that if the vendor of a lot of ground assures the vendee, although not in writing, that a piece of ground adjoining thereto is always to be kept open as an alley, by which assurance the vendee is induced to make the purchase or to give a higher price for the property, a court of equity will perpetually enjoin the vendor from shutting up such alley. *Trueheart v. Price*, 2 Munf. (Va.) 468 (1811).

§ 261. — discretion of the court.

In equity a decree is never of right, as a judgment at law is, but of grace, and the chancellor will consider whether he will not do a greater injury by enjoining than would result from refusing, and leave the party to his redress at the hands of a court and jury. It is not every purely technical violation of a covenant or duty that a court of equity will enjoin.

Equitable relief, even where a strict right exists to the complaining party, is so largely discretionary, where great hardship to the defendant will ensue from the maintenance of such relief, or where there is doubt as to whether the legitimate use of property has been exceeded to the annoyance of others, that all of the consequences of the enforcement of such relief will be duly considered, as well as the conduct of the parties towards each other carefully weighed. *Leonard v. Hotel Majestic Co.*, 17 N. Y. Misc. 229, 40 N. Y. Supp. 104 (1896).

The enforcement of restrictions on the use of land is somewhat a matter of discretion with the court. *Russell v. Harpel*, 20 Ohio Cir. Ct. Rep. 127, 10 O. C. D. 732 (1900).

There are numerous instances where the courts refuse on equitable grounds to enforce restrictive covenants, for in all cases where specific performance is sought in equity, the matter rests largely in the discretion of the chancellor and in no case should relief prayed for be given when, under the circumstances, the giving of such relief would violate other familiar principles of equity jurisprudence. *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668 (1907).

§ 262. Equity observes substance rather than form.

In dealing with property restrictions, equity does not concern itself with the form of the language in which the restriction is couched, but deals only with its substance. For instance, it will disregard the inquiry whether it is a condition or a covenant, and enforce it when it was plainly intended by the parties that it should be for the benefit of the land held by the plaintiff. *Coughlin v. Barker*, 46 Mo. App. 54 (1891).

Although a clause imposing a restriction on property is a strict condition in law, equity will only inquire into the substantial elements of the agreement, and will enforce it for any one for whose benefit it appears to have been made. *Clark v. Martin*, 49 Pa. St. 289 (1865).

§ 263. Protection of artistic sensibilities.

It has been said that, "The court of chancery has never used the tremendous power of the injunction process to protect artistic sensibilities. An extension of its power into that domain would be most dangerous. Its mode of exercise would vary with the kind and degree of cultivation possessed by the individual chancellor in matters of taste, for it is the subject of every day observation that there are many specimens of landscape gardening and of architecture, to say nothing of sights and sounds and odors in general, which, while pleasing and agreeable to many men, are offensive in the extreme to others." *Bayard v. Bancroft*, ... Del. Ch. ..., 62 Atl. 6 (1905).

This rule as stated, it is thought, is too broad. But in nearly all cases in which the violation of a restrictive covenant is sought to be enjoined, the question of substantial loss is involved. The object of an action may be to enforce a covenant for the protection of that which is merely pleasing to the senses, instead of the protection of grosser and less worthy rights, but the element of monetary value, something that can be understood by those lacking in the higher sensibilities, is incidentally present and has the effect of protecting the other. It may well be contended that, as we progress towards a higher civilization; courts of equity should and will extend

their jurisdiction to include actions to protect rights in the purely beautiful.

§ 264. Right to relief in general.

The right to equitable relief in cases in which it is sought to enforce the observance of restrictions on the use of land depends upon, (1) a precedent agreement by which a restriction is imposed upon the lot owned or held by the defendant for the benefit of the lot owned or held by the complainant; (2) in case the agreement is made by the defendant's predecessor in title, notice in some form to the defendant of the fact and nature of the agreement.

It follows, that in every such case the initial inquiry is, whether the restriction sought to be enforced was imposed upon the land owned by the defendant for the benefit of the land owned by the plaintiff. If this question is answered in the negative, the action fails. *Coughlin v. Barker*, 46 Mo. App. 54 (1891).

§ 265. Breach of covenant constitutes the cause of action.

Where restrictive covenants are in reality express contracts that a certain status shall not be altered, the essential fact is the breach rather than the injury. If parties have settled their rights in regard to a parcel of land by covenant, these must be observed whether non-observance will inflict injury or not. "A plaintiff may restrain a continuous breach which is beneficial to him, and may stand on the very letter of his obligation, for a party may not make a valid engagement and then disregard it on the ground that no harm will result." *Kenwood Land Co. v. Hancock Investment Co.*, 169 Mo. App. 715, 155 S. W. 861 (1913).

It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales were made, but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan. *Wood v. Stehrer*, 119 Md. 143, 86 Atl. 128 (1912); *Clark v. Martin*, 49 Pa. St. 289 (1865).

§ 266. When breach is committed.

A restriction against the erection on premises of a building for a certain purpose, is broken when a building is erected and equipped in such a way that the business referred to may be carried on in the same as it stands.

Thus, a covenant provided against erecting or permitting any distillery on the granted premises. Defendants erected a manufactory for the distillation of resin oil, and one for the production of paraffine. Both buildings and machinery were like those usually employed in the distillation of alcohol, and such distillation might be accomplished by means thereof. Held, that it was not necessary, in order to show a breach thereof, to prove an actual use of such buildings and machinery for the purpose of a distillery; that it was enough that they might be so used, and that a breach was committed before an actual use. *Atlantic Dock Co. v. Leavitt*, 50 Barb. (N. Y.) 135 (1867).

Where the language of a restrictive covenant is such as to show that the covenant is directed at the number of buildings and also the character of the occupancy or use thereof, a building which offends in either particular is objectionable. *Kenwood Land Co. v. Hancock Investment Co.*, 169 Mo. App. 715, 155 S. W. 861 (1913).

§ 267. Injunction.

Injunction is the proper remedy to enforce against the purchaser or occupier of land with notice, a valid restriction imposed on the use of that land. *Morris v. Tuskaloosa Mfg. Co.*, 83 Ala. 565, 3 So. 689 (1887); *Stafford v. Swift*, 121 Ill. App. 508 (1905); *Phenix Insurance Co. v. Continental Insurance Co.*, 14 Abb. Pr. N. S. (N. Y.) 266 (1873).

Where one has bought a lot subject to a building line agreement made by the previous owner of all the property on both sides of the street, he will be enjoined from building in violation of the agreement. *Tripp v. O'Brien*, 57 Ill. App. 407 (1894).

Although the remedy of injunction is extraordinary, and in some instances a harsh one, yet it is sometimes the only remedy available for preventing a party from deliberately violating

his contracts and thereby inflicting an injury upon another for which the latter has no redress. *State Bank v. Rohren*, 55 Neb. 223, 75 N. W. 543 (1898). In cases proper for its exercise, it ought not to be withheld merely for the reason that it will cause pecuniary loss. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910).

To justify the issuance of a preliminary injunction complainant's case must exhibit a right free from doubt or reasonable dispute. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583 (1899). But where there has been a clear and substantial violation of a building restriction, and there are no equitable considerations to relieve the defendant from the necessity of complying with the restriction, the fact that compliance with the decree will be inconvenient and expensive is immaterial. *Taylor v. McAdam*, 112 N. Y. Supp. 50 (1908). It has been held that a mandatory injunction is properly granted against one who, although repeatedly warned, and in violation of restrictive covenants in his deed, builds his house nearer the street than other houses in the block. *Lyons v. Edmonds*, 146 N. Y. Supp. 277 (1914).

In a suit to enjoin the defendants from selling intoxicating liquor on certain premises in violation of a restrictive covenant, in which the defenses were that there had been such a change in the character of the neighborhood as to render the restrictions obsolete and unenforceable, and waiver; and which could not well be tried by affidavit; the court held that an injunction *pendente lite* would not be disturbed, but that the plaintiff, having thus halted the defendants, should not be allowed to rest, and if he was not ready for trial at the first possible moment, the defendants should be heard for a vacation of such restraining order. *Duryea v. Auerbach*, 149 N. Y. Supp. 432 (1914).

Injunction will lie to restrain a tenant from interfering with the landlord's erection of a "to rent" sign on the premises where the latter has the right under the terms of the lease to erect the same on the demised premises. *Stafford v. Swift*, 121 Ill. App. 508 (1905).

The general rule is that an injunction will not be granted to restrain a defendant from violating negative covenants

when the agreement is of such a nature that it cannot be specifically enforced, where specific performance is the object of the suit. Where the object of the suit is not to enforce specific performance of the agreement, which contains both affirmative and negative covenants, there are cases which hold that a court of equity may interfere by injunction to prevent the breach of a negative covenant, although the affirmative stipulations are of such a nature that they could not be specifically enforced. However, these cases are conflicting and irreconcilable, but all the authorities seem to concur in the rule that in no case will such an injunction be granted, unless it appears that the complainant has no adequate remedy at law. *Lanston Monotype Mach. Co. v. Times-Dispatch Co.*, ... Va., 80 S. E. 736 (1914).

§ 268. Issuance of injunction without notice to defendant.

Where a bill for an injunction is under oath, is positive in its averments as distinguished from allegations made upon belief and information, and shows sufficient likelihood of prejudice resulting to complainant's rights from delay which would result from giving notice of the application for injunction, an injunction will be issued without notice. *Stafford v. Swift*, 121 Ill. App. 508 (1905).

A bill showed that appellee was entitled under the covenants of a lease to maintain a sign or notice on the premises showing that they were for rent, that appellant had twice removed or torn down such notice and refused to allow it to be again put up on the premises. There remained only about a month before the first of May, at which time the lease expired, in which to secure a tenant, and it was evident that if delay were had appellee might be unduly prejudiced by inability to at once notify the public passing by, that the premises were for rent. Appellant's conduct in the matter was such as to warrant the apprehension that if notified of the application for injunction he would delay the proceedings in so far as lay in his power. Upon the whole, it was held, that the issuance of the writ without notice was justified. *Stafford v. Swift*, 121 Ill. App. 508 (1905).

§ 269. Notice to defendant before applying for injunction.

The right to maintain an action to enforce observance of a restrictive covenant does not depend upon the giving of notice to the person violating the same prior to the completion of the structure which constitutes the violation, that the erection will be a violation of such restriction, where the deed under which he claims gives him notice of what the restrictions are. *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911).

§ 270. Injunction as preventive remedy only.

While it is true that an injunction will not lie for past injuries, it is also well established that the jurisdiction of a court of equity may be exercised by way of mandatory injunction to compel the observance of a restrictive covenant which has been violated by the erection of some structure contrary to its terms. Mandatory injunction is proper to restrain one from permitting any parts of a building, which has been erected contrary to restrictions, to remain. It is not essential that the complainant show actual damage resulting from a breach of the restrictions, but it is proper in such cases to grant the injunction in mandatory form, requiring not only that the defendant shall in the future desist from persisting in a violation of the restrictions, but that he shall remove the encroachment on the restricted portion of the premises already made. *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911).

It is held that a covenant on the part of the lessee of land to erect houses thereon within a given time, constitutes an exception to the rule that specific performance of a building contract will not be ordered. *Wolverhampton v. Emmons* (1901) 1 K. B. 515.

A suit for an injunction to prohibit the violation of a negative covenant in a lease, does not amount to an action for specific performance, and is not governed by the same rules, except, perhaps, in a general way.

Where a lessee covenanted in his lease to buy all the draught beer to be used or sold on the demised premises from the lessor, it was held that he was not required to carry on or

conduct a saloon business on the premises, nor was he required to buy beer of the grantor. And that an injunction would not require him to specifically perform such agreement, but would merely restrain him from selling any other beer than that of the grantor on the premises. *Anheuser-Busch Brewing Assn. v. Dwyer*, 150 Ill. App. 315 (1909).

**§ 271. Mere apprehension as justifying injunction.—
Threatened breach.**

Equity will not interpose merely to allay the fears or apprehensions of a property owner that a restrictive covenant might be violated in the future.

Where a bill for an injunction prays that the defendant may be restrained from using his kitchen and maintaining a nuisance, and in fact the house has never been occupied, and the kitchen has never been used, so that no nuisance had been committed or threatened, such prayer must be disregarded. *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158 (1913).

It is sufficient if there is a well grounded apprehension or a reasonable probability that the covenant will be broken. *Kenwood Land Co. v. Hancock Investment Co.*, 169 Mo. App. 715, 155 S. W. 861 (1913).

It has been held that the threatened breach of a restrictive covenant is a sufficient ground for the issuance of an injunction, and this regardless of whether the breach would inflict injury upon the covenantee. *Lowrance v. Woods*, 54 Tex. Civ. App. 233, 118 S. W. 551 (1909).

A notice of an intention to violate a restrictive covenant given by one succeeding to the title of the grantee to the owner of a lot for whose benefit the covenant was made, is sufficient to authorize the interference by a court of equity to restrain such violation. *Lattimer v. Livermore*, 72 N. Y. 174 (1878).

§ 272. What agreements will be enforced.

When it appears by the true construction of a grant that it was the well understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement,

in the property granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether it be in the form of a condition, covenant, reservation, or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass with the lands to all subsequent grantees. And any grantee of the land to which such right is appurtenant, acquires, by his grant, a right to have the servitude or easement, or right of amenity as it is sometimes called, protected in equity, notwithstanding his right may not rest on a covenant which, as a matter of law, runs with the title to his land, and notwithstanding it may also be true that he may not be able to maintain an action at law for the vindication of his rights. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190 (1890).

✓ In reference to their enforcement in equity, there is no distinction between a restrictive covenant that runs with the land and one that does not. Equity will enforce personal covenants or agreements bestowing benefits and imposing restrictions upon the use of land against all who take such land with notice of an existing claim or interest in favor of another. *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686 (1906).

A restriction on the use of land may be enforced in equity, although, strictly, it is neither a real covenant nor a technical qualification of title. *Whitney v. Union R. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858).

A court of equity will not enforce a mere parol agreement by a person joining as a tenant in common with others in the purchase of lands not to herd or graze sheep thereon against his grantee. *Long v. Cramer Meat & Packing Co.*, 155 Cal. 402, 101 Pac. 297 (1909).

An agreement under seal, made subsequent to the conveyance of a lot, that the vendee would build a residence thereon within a year to cost not less than a certain sum, and the front wall of which would be a certain distance from the street line, and that the vendors, in case of further conveyances of lots on that street, would make certain stipulations relative to the use of such lots, will be enforced in equity against a

subsequent grantee with notice, although such an agreement neither creates an easement nor runs with the land. *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206 (1873).

It has been held in a Massachusetts case that a court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy, as exceptions or reservations out of a grant not binding as covenants real running with the land; and that it is not material that such stipulations should be binding at law, or that any privity of estate should subsist between parties, in order to render them obligatory, and to warrant equitable relief in case of their infraction. "A covenant, though in gross at law, may, nevertheless, be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege, or, as it is sometimes called, 'a right to an amenity' in the use of an adjoining parcel, by which his own estate may be enhanced in value, or rendered more agreeable as a place of residence. Restrictions and limitations which may be put on property by means of such stipulations, derive their validity from the right which every owner of the fee has to dispose of his estate, either absolutely or by a qualified grant, or to regulate the manner in which it shall be used and occupied. So long as he retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally, and can be specifically enforced in equity. When he disposes of it by grant or otherwise, those who take under him cannot equitably refused to fulfill stipulations concerning the premises, of which they had notice. It is upon this ground that courts of equity will afford relief to parties aggrieved by the neglect or omission to comply with agreements respecting real estate, after it has passed by mesne conveyances out of the hands of those who were parties to the original contract. A purchaser of land with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to

the estate, of which he had notice when he became the purchaser. In such cases, it is true that the aggrieved party can often have no remedy at law. There may be neither privity of estate, nor privity of contract, between himself and those who attempt to appropriate property in contravention of the use or mode of enjoyment impressed upon it by the agreement of their grantor, and with notice of which they took the estate from him. But it is none the less contrary to equity that those to whom the estate comes, with notice of the rights of another respecting it, should wilfully disregard them, and in the absence of any remedy at law, the stronger is the necessity of affording in such cases equitable relief, if it can be given consistently with public policy, and without violating any absolute rule of law." *Parker v. Nightingale*, 88 Mass. (6 Allen) 341, 83 Am. Dec. 632 (1863).

An agreement between owners of adjacent lands, restricting the mode of their use and enjoyment, although not entered into in the form of a covenant or condition, or so framed as to be binding on heirs and assigns by virtue of privity of estate, may nevertheless create a right in the nature of a servitude or easement in the lands to which it relates, which can be enforced in equity. *Hubbell v. Warren*, 90 Mass. (8 Allen) 173 (1864).

But to establish such *quasi* servitude or easement, it must appear, either from express stipulation or necessary and unavoidable implication, that the parties intended to impose a permanent restraint on the use or mode of occupation of their respective estates. *Hubbell v. Warren*, 90 Mass. (8 Allen) 173 (1864).

§ 273. Enforcement of covenants in leases.

It is a well settled rule that provisions in a lease by which the lessee agrees that he will not use the leased premises for certain purposes, or carry on any kind of business thereon except the kind named, may be enforced by injunction. *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305 (1900); *Chamberlain v. Brown*, 141 Ia. 540, 120 N. W. 334 (1909); *Dodge v. Lambert*, 2 Bosw. (15 N. Y. Super. Ct.) 570 (1858); *Howard v. Ellis*, 4 Sandf. (N. Y.)

369 (1851); *Frank & Co. v. Brunnemann*, 8 W. Va. 462 (1875).

Where the parties to a lease by an express stipulation, have determined that a particular trade or business conducted by the one will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which a court of equity can perceive may be highly detrimental to the other, although, on the facts presented, it is not clear that there is a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, it is the duty of the court by injunction, to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and at the same time protect the rights of the complainant. *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587 (1847).

A lessor of premises may, by injunction, prevent his lessee, or those claiming or holding under him, or acting by his authority, from converting the demised premises to uses inconsistent with the terms of the contract, and from making material alterations for such purposes, and also from committing other kinds of waste. *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67 (1853). And where the use sought to be enjoined not only violates the covenant of the lease, but also the sanctity of the Sabbath, the interposition of the court by injunction is eminently proper. *Dodge v. Lambert*, 2 Bosw. (15 N. Y. Super. Ct.) 570 (1858).

In a proper case a court of equity will enjoin a tenant from doing a certain act, whether it amounts to waste or not, provided it be directly contrary to the tenant's covenant in the lease, or even in contravention of an agreement which may be inferred from a course of dealing between the parties. *Frank & Co. v. Brunnemann*, 8 W. Va. 462 (1875).

Where premises are leased for a particular purpose, or for the carrying on of a specified business, it is quite apparent that any legal remedy which the lessor might have would not be adequate. It is not a question merely of damages, but the right of the lessor to control the premises or to put them to such uses as he might deem best.

Where premises were leased for the "sale of teas, coffees

and similar goods," and the lessor gave his consent to their use by a sub-lessee for the sale of small musical instruments and sheet music, injunction issued at the instance of the lessor to prevent their use for a misfit clothing house. *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N. W. 47 (1890).

A corporation formed for the purpose of holding land for carrying on religious exercises and meetings thereon, leased a portion of its land subject to restrictive covenants that the lessees "during all meetings would be subject to the rules and regulations of said meeting," and "would use such premises for the purposes of a private dwelling or residence only, except on a special permit from the company." It was held that injunction would issue to restrain a breach of such covenants. *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576 (1900).

An injunction will not issue to restrain a lessee from mining coal in violation of the terms of his lease when it appears that the method being followed by him is a better, safer, and more proper method for mining under the circumstances existing in such mine, and where it further appears that no damages have resulted, and that none are likely to result which would be irreparable. *Streng v. Buck Run Coal Co.*, ... Pa. St. ..., 88 Atl. 796 (1913).

A lessee will be enjoined from violating a restrictive covenant in his lease forbidding him to post any signs or notices within fifteen feet of the entrances to other portions of the building retained by the lessor without the latter's consent, where it appears that such violation was wilful. *Bartholdi Realty Co. v. Robard Realty Co.*, 156 N. Y. App. Div. 528, 141 N. Y. Supp. 353 (1913).

An act on the part of a lessee which would not otherwise be a breach of covenant cannot be converted into such by the landlord serving him with notice to quit. *Bush v. Lucas*, 54 Sol. Jo. 200 (1910) 1 Ch. 437.

§ 274. — enforcement of covenant to sell only specified brand of beer.

Courts of equity sometimes lend their aid to the enforcement of a covenant by a lessee to sell only a designated brand

or make of beer on the demised premises. Such leases are common between brewery companies, owners of premises, and lessees of the premises who lease them for saloon purposes. *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305 (1900). However, such aid is frequently withheld.

Premises were leased on condition that the lessee should buy beer to be sold thereon only from the lessor. Subsequently, due to a demand for other brands of beer, the lessee bought beer from some other manufacturer, but continued to push the sale of the lessor's beer, and only bought and sold other brands as the exigencies of the trade demanded. It was held that injunction would not issue and that the complainant had an adequate remedy at law. *Voight Brewery Co. v. Holtz*, 168 Mich. 352, 134 N. W. 19 (1912).

In this case it appeared that the injury complained of was neither irreparable nor great. From July 10, 1910, to the time of filing the bill for injunction, the other beer bought by defendant, including three barrels in bulk, did not exceed fifty dollars in value, during which time he bought one-half barrel a day of complainant's beer. For twenty-six days in a month that would amount to thirteen barrels or one hundred and thirty barrels for the ten months. He pushed the sale of complainant's beer, and only bought and sold other brands as the exigencies of his trade demanded. Complainant cited a number of cases where injunction was granted for breach of similar lease provision, but in them the violations were hostile, extensive, and inexcusable, without color of right or equitable circumstances. The court declared that it was not committed to the rule that a court of chancery will interfere by injunction, which must necessarily operate as a decree for specific performance, to enforce contracts to sell a particular brand of beer, when the only purpose is to insure a brewer the profits arising from such sale. "To do so would be for the court to undertake the work of supervising, directing, compelling the performance of, in effect governing by injunction, private contracts engaged in the liquor traffic (a business by sufferance), which contracts might, and often do, extend over a term of years."

So, it has been held, that equity will not enjoin the selling on mortgaged premises of beer not of the mortgagee's manufacture, in violation of the terms of the mortgage, the acts complained of not tending to lessen the mortgagee's security. *Hardy v. Allegan Circuit Judge*, 147 Mich. 594, 111 N. W. 166, 10 L. R. A. (N. S.) 474, 14 Det. Leg. N. 21 (1907). This case was so decided on the ground that the remedy at law was entirely adequate.

In this respect the court said: "All that complainant is entitled to is the profits of which he is deprived by the breach of his contract, and this he can recover in an action at law. The circumstance that the performance of the stipulation is secured by a mortgage may give the brewing company a lien for its damages, and may, perhaps, enable those damages to be determined upon the foreclosure of the mortgage; but it does not entitle the brewing company to enforce that stipulation by injunction. A stipulation not in its nature enforceable by injunction is not so enforceable because its performance is secured by a mortgage. A mortgagee under our law has only a lien upon the mortgaged land to secure his indebtedness. He has no grievance from anything that is done on that land which does not impair its value as such security. Until he has obtained title by foreclosure, he cannot, even by stipulation in a mortgage, interfere with the mortgagor's right of possession. I think it clear that equity will not in this instance enjoin any act of the mortgagor which does not lessen the value of his security. Conformity to the stipulation in question will not improve the security of the mortgagee, and a breach of it will not impair the value of that security. In other words, that stipulation has no relation to the mortgagee's interest in the land. I am unable to see, then, why the law laid down in this case will not apply to all stipulations, though not secured by any mortgage. If an injunction is issued to prevent a breach of this agreement, I do not know how it can be refused to prevent the breach of all similar agreements. In that case, whenever a business man agreed to sell in his place of business the products of a certain dealer and to refuse to sell any other, a court would enjoin a breach

of the last mentioned agreement. This would, in my judgment, be opposed to reason and authority."

§ 275. Where there is an adequate remedy at law.

Ordinarily an action at law for the breach of a negative covenant does not afford the aggrieved party an adequate remedy, consequently equity will interpose by injunction to prohibit the breach. *Ware v. Langmade*, 9 Ohio Cir. Ct. Rep. 85 (1894).

Ordinarily it would be impossible to accurately ascertain the damages that would arise from the breach of a covenant not to assign or sub-lease the premises, therefore, on this ground alone, if for no other, equity is justified in interfering to enforce observance of such a covenant.

The violation by a lessee of an agreement on his part to sell no other beer than that manufactured by a designated company, will be enjoined in equity, since the remedy at law would be inadequate. *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305 (1900).

Equity will restrain the use of leased premises for a purpose other than that for which they were demised, without any proof of irreparable or even substantial injury due to the breach of the covenant. If the lessor has no adequate remedy at law injunction will issue.

Where premises were leased for carrying on a regular dry goods jobbing business and for no other purpose, and the lessee was carrying on the business of an auctioneer on said premises, it was held that the lessor had no adequate remedy at law and that an injunction would issue. *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587 (1847).

In this respect the court, in the case last cited, said: "In the first place, it is manifest that at law a new cause of action will arise every day that the defendants sell at auction. If the lessor avail himself of his full rights at law, he will sue daily for damages. This would lead to a multiplicity of suits, harrassing to both parties, and highly obnoxious to the sensure of a court of equity. Then if the suits were brought, how is it possible to estimate the damages? A jury might enter into a wide field of conjecture, without any certainty

of coming out of it at the point of justice to the parties. The jurors might infer that the continuance of an auction business in the demised premises, would for years diminish the rent of the adjoining property, and render the premises less desirable to good tenants. But any estimate of damages on that basis, however well founded, would be wholly conjectural. A different jury might imagine that the conducting of an auction business would enhance the value of the adjoining premises, and refuse to give any damages. And witnesses could undoubtedly be produced, whose opinions would sanction a finding in either of these modes."

It has been held that a restriction against the use of fire arms on a tract of land imposed for the benefit of remaining lands owned by a gun club is enforceable in equity on the theory that the destruction or impairment of the restriction would tend to drive game away from the dominant estate and constitute an injury which cannot be estimated in money damages. *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625 (1910).

In this case it was stated by the court: "The court finds that a disregard of the covenant of the deed here being considered would greatly injure defendant in the use and enjoyment of its remaining lands, and the evidence in the record amply supports such finding. Law recognizes as property and entitled to protection an exclusive right to hunt upon game preserves; also, that the destruction or impairment of such a hunting privilege by the driving away of the birds and deterring their return, constitutes an injury which cannot be estimated in money damages, and on account of which an injunction will lie. It follows, therefore, that as to such rights, and the use of property connected therewith, the same rules are applicable as to any other species of property used or intended for any other legitimate use."

A right of re-entry reserved in a lease for breach of condition, has been held not to be an adequate remedy so as to deprive the lessor of the right to injunction to restrain such breach. And this, although the lease stipulate that such re-entry shall not work a forfeiture of future rents, unless it

also provides expressly, or by necessary implication, that the lessor shall not be held to account to the lessee for the possession after the re-entry. *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241 (1884).

In this case the court said: "A right of re-entry reserved in a lease can rarely be said to be in law a fair equivalent for a performance of the lease. If the re-entry have the effect to terminate the lease, then, as the continuance of the lease and the performance of its terms by the tenant must be presumed to be of some benefit to the landlord, such re-entry is not an adequate remedy, for it does not leave the landlord in as good a position as enforcing performance by the tenant would leave him in. It is claimed, however, that under this lease a re-entry by the plaintiffs would not suspend the tenant's obligation to pay the rent to the end of the term, and that, therefore, it is not the same as would be a case where the re-entry terminates the lease. This would have to be conceded if we could conceive that the landlord might terminate all the tenant's rights under the lease, and still enforce against him all its obligations. It might, perhaps, be competent for the parties to make such a lease; but certainly, before a court would hold such to be its effect, the intent that it should so operate would have to be clearly and unmistakably expressed. Unless excluded in express terms, or by necessary implication, the landlord, so long as after re-entry, he exacted payments of the rents, would have to account for the value of the possession, or at least for such rents as he should make, or might with proper diligence make, by means of such possession. That, certainly, could not be so beneficial to the landlord as performance of the lease by the tenant. The right of re-entry is not in this case an adequate remedy, such as to deprive plaintiff of the right to an injunction."

It is now a general rule that where one has made a valid contract that he will not engage in a certain trade or occupation, and it is shown that the said contract is violated to the injury of one entitled to enforce the same, he is entitled to an injunction against the offending party. This is upon the ground that, from the nature of the case, just and adequate

damages cannot be estimated for a breach of the contract. *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305 (1900).

Complainant leased a right to remove sand from a farm belonging to defendants and it was one of the conditions of the agreement that the excavations should be made as near as could be to a designated place. Complainant commenced to dig sand some eighty rods from the place designated, and defendants interfered to prevent it. It was held that the complainant had an adequate remedy at law, if the defendants refused to comply with their contract, and could not sue to enjoin them from interfering. *Thompson v. Weeks*, 32 Ill. App. 642 (1889).

In this respect the court said: "By the time the cause could be heard the work would be done at the disputed point, and perhaps irreparable injury caused to the farm, and the court may finally decide that possession was wrongfully taken. By the time this cause is heard another and another point may be selected, and the same process repeated until finally the farm is ruined, and this by the unwarranted interference of a court of equity. What is sought to be done by this injunction and bill is, in our opinion, farther from being within the jurisdiction of a court of equity than a bill purely for specific performance. It encourages acts of trespass and the taking the law into his own hands by appellee, by tying appellants' hands by injunction, while the former takes execution of the contract as he interprets it at his own will before hearing. Thus, by the unwarranted interference of a court of equity, the appellants' farm may be irreparably injured, which ought to be a sufficient test to show that a court of equity ought not to take jurisdiction as one of the principal grounds of equity jurisdiction is to grant injunctions to prevent irreparable injury, while taking jurisdiction in a case like this would be to aid it."

A contract providing for the manufacture of certain electrical equipment by one party for the other, provided that in case of a violation of the same by either party such party should pay as liquidated damages and not as a penalty, fifty per cent of the price at which the appliances referred to were

at the time being regularly sold to users. It was held that performance at all events was not contemplated by the parties, and that equity would not restrain defendant from violating the contract, on the ground that complainant had no adequate remedy at law. *General Electric Co. v. Westinghouse Electric & Manufacturing Co.*, 144 Fed. 458 (1906).

In this respect the court said: "As already seen, the damages fixed and stipulated may be readily and fully ascertained and determined as to amount and recovered in an action at law, and the remedy at law is full, complete, and adequate as fixed and stipulated by the parties themselves in case of a violation of the agreement in the respect complained of."

Where it appears that the plaintiff has an adequate remedy at law, injunction will not issue to restrain the breach of a mining lease. *Streng v. Buck Run Coal Co.*, ... Pa. St. ..., 88 Atl. 796 (1913).

§ 276. To prevent irreparable damage.

Equity will interpose to prohibit the violation of a restrictive covenant in order to prevent irreparable injury. And while this is the theory upon which the court will interfere, yet the court will not enter into nice discriminations as to the extent of the damages. *Rockafellow v. Hanover Coal Co.*, 2 Pa. Dist. 108, 12 Pa. Co. Ct. 241 (1892).

Wrongful acts of a repeated and continuing character, occasioning damages which are estimable only by conjecture and not by any accurate standard, constitutes "irreparable injury" within the meaning of those words as used in equity to justify a court in interposing to prohibit such acts. *Rockafellow v. Hanover Coal Co.*, 2 Pa. Dist. 108, 12 Pa. Co. Ct. 241 (1892).

It has been held that the breach of a covenant against the alteration of demised premises by the erection of a wooden awning supported by posts and attached by a cleat screwed to the outer walls of the building, would not be enjoined because the injury to the lessor's rights were not irreparable, or such as could not be probably satisfied at law. *Trenor v. Jackson*, 15 Abb. Pr. N. S. (N. Y.) 115 (1873). "The damages for the breach are, I think," said the court, "capable of

being ascertained, and a recovery of such damages at law would be a satisfaction, and would cover the continuance of the injury, as well as the present damage."

A farm was leased for one year and it was provided in the lease that the lessor should have the right during the continuance of the lease to go upon the land and fall plow and sow a part of the land proper to be so plowed and sowed. The lessee refused to permit the lessor to go upon the land in accordance with the terms of the lease, and it was shown that the tenant was insolvent. It was held that the right of the lessor was a right of substantial value, and although depriving him of the right would be a matter of small consequence, yet it would be irreparable, and that he had no adequate remedy at law therefor, and that an injunction would issue restraining the tenant from such violation of the lease. *State Bank v. Rohren*, 55 Neb. 223, 75 N. W. 543 (1898).

In this respect it was said by the court: "A second argument is that the bank has an adequate remedy at law by declaring the lease at an end on account of the lessee's refusal to permit the lessor to enter upon and fall plow and sow the stubble land and then bring forceable detainer for the possession of the premises. The answer to this is that the landlord cannot cancel this lease and retake possession of the leased premises by forceable detainer because of the lessee's refusal to permit appellee to enter upon the land and fall plow it, as the lease makes no provision for its forfeiture on that ground.

"Another argument under this same head is that, since the lease reserved the right of the landlord to enter upon and fall plow and sow the stubble land, therefore it has a remedy at law by suit of forceable detainer to recover from the tenant possession of the stubble land which it wishes to sow in wheat. We do not subscribe to this argument. For the landlord to recover possession of the leased premises or any part of them appellee would have to establish that the tenant was wrongfully withholding possession of the premises. This it could not do. The right to the possession of all the premises is in the tenant until March 1st, 1898. The lease does not reserve

to the landlord possession and rights of possession during the existence of the lease of any portion of the premises, but only the right to enter upon them for the purpose of fall plowing, etc.

“A final argument is that if appellee should sow the stubble land to wheat and rye, and if the appellant should permit his cattle and other stock to run upon said ground and injure and destroy such wheat and rye, then appellant for such injury is provided with a complete and adequate remedy at law by sections 1 and 2, article 3, chapter 2, Compiled Statutes, which makes the damage done to property committed by stock running at large a lien upon the stock. If the appellee at the time it brought this action had already fall plowed and sowed the lands to wheat and rye, and sought the injunction because the appellant threatened to permit his stock to run upon and destroy the wheat crop, there might be some force in the argument; but the threat of the appellant to permit his stock to run upon and injure the crop of wheat which the appellee may sow on the land is merely an incidental feature of this case. The gist of this action is the refusal of the appellant to permit the appellee to enter upon the lands and fall plow and sow them to wheat in accordance with the lease between the parties.”

§ 277. To prevent a multiplicity of actions.

It is a well known rule that equity will exercise its jurisdiction to prevent a multiplicity of suits. This rule where applicable is sufficient to justify a court of equity in entertaining a suit in relation to restrictive agreements concerning real property.

A covenant not to use the demised premises for a purpose extra hazardous on account of fire, is a subject of equitable cognizance, and a continuing breach thereof will be enjoined, in order to avoid a multiplicity of actions. *Gillilan v. Norton*, 6 Rob. (29 N. Y. Super. Ct.) 546 (1867).

Where parties entered into a contract whereby one party agreed not to manufacture certain electrical appliances except on the failure of the other party to furnish the same at

certain prices, and provided that in case of violation the defendant would pay as liquidated damages, and not as a penalty, fifty per cent of the price at which such appliances at the time were being regularly sold to users, equity refused to interfere by injunction to restrain a violation of such contract in order to avoid a multiplicity of actions at law for damages. *General Electric Co. v. Westinghouse Electric & Manufacturing Co.*, 144 Fed. 458 (1906).

In this case the court said: "The contract was voluntarily entered into and complainant must have had in mind the possibility of violations by defendant company and the possible necessity of successive actions to recover the stipulated damages. It is not the case of a number of either unnecessary or vexatious suits brought against the plaintiff when the questions in controversy might be settled in one. It is not the case of repeated trespasses, or threatened trespasses, upon real estate, or the case of a large number of contracts, such as bonds, or even promissory notes, held by one person and the defense is the same as to all and the purpose is to restrain a disposition of same by the holder and prevent ruinous litigation by a large number of actions. Nor is it the case of a large number of actions against a defendant to recover separate penalties when the trial and determination of one action will settle the right of recovery as to all. . . . It is apparent that the real ground on which complainant proceeds is a desire and purpose to enforce or compel, if possible, a specific performance of the contract by the defendant company, in so far, at least, as it has agreed to sell controllers of complainant's make only. This cannot be done under the guise of preventing a number of suits the necessity for which, if it shall exist in the future, must have been and evidently was foreseen by the complainant company and made possible by its own conduct entering into the contract. And, in this connection, it may be remarked that all suits on the contract, in this regard, except the first, will be but a mere assessment of damages, as all defenses, unless complainant shall violate the contract, will have been forever settled between the parties and their privies in the first action, whether pleaded or not."

§ 278. Effect of penalty specified for breach of covenant.

Where there is a penalty expressly provided for a breach of a covenant restricting the use of land, the covenantor is bound to do, or refrain from doing, the very thing stipulated for or against, unless it appears from the particular language, construed in the light of the surrounding circumstances, that it was the intention of the parties, that the payment of the penalty should be the price of non-performance and to be accepted by the covenantee, in lieu of performance. The covenantor is bound to observe the stipulations of the covenant and is not allowed to commit a continuing breach thereof merely upon the payment of the penalty provided; and although he has committed a breach of the covenant and paid such penalty, that fact does not release him from obligation to perform. He is still bound by his covenant. *Phoenix Insurance Co. v. Continental Insurance Co.*, 87 N. Y. 400 (1882). If the primary intent appears to be that the covenant should be performed, the penalty is regarded merely as a security, and not as a substitute therefor.

Even though the agreement itself fixes a penalty for its violation, it will not follow that equitable relief must be denied, for, if the contract appears to be such in its character and purpose that its performance was contemplated by the parties and not merely damages for the breach, equitable relief will be awarded. *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81 (1891), reversing 14 N. Y. Supp. 362; *Gillis v. Hall*, 2 Brewst. (Pa.) 342 (1870); *Coles v. Sims*, 5 De G. M. & G. 1 (1854). Regardless of such a provision, the grantee may be enjoined from violating the restriction. *Phoenix Insurance Co. v. Continental Insurance Co.*, 14 Abb. Pr. (N. S.) (N. Y.) 266 (1873).

In the case last cited it was said by the court: "It must be taken that the promise must be kept; that that was the purpose and the expectation. But while a court of equity, with a degree of freedom not favored by the common law, in considering the nature of an engagement searches for the very right of the matter through the maze of forms, it leaves the parties, as at law, freely to make their own bargains and act upon them as made. When the intention is to substitute

for the principal benefit the performance of some other act, that purpose should be indicated with reasonable certainty. But if the stipulation were merely in the alternative form, and a right of election conceded, it would remain to be determined in which of the parties that right resided. In this instance the covenantor adds to his undertaking that for a violation of it he will pay fifteen hundred dollars liquidated damages. Had he, or, rather, have these defendants, standing, for the purposes of the present inquiry, in his place and stead, the right to determine whether the undertaking shall be observed or the money paid? Have they the power to elect? I think not, and this, not only because the sum specified is inadequate, but because of the principle involved.

"Nothing less than a clearly manifested intention, or a provision in the contract vesting that right in the covenantor, would suffice. There should be something in its nature and effect equivalent to a release or satisfaction of the principal obligation. The agreement to pay a fixed sum for, or when there shall have been, a violation of the duty previously imposed or accepted is not a license to enter at will upon that wrongful act.

"The general doctrine taught by the cases is that the specific agreement to do or not to do an act is the actual undertaking, standing in effect as if separate from the annexed clause as to damages, and must be observed. The exception to that general rule is when the covenant gives, or, taken as a whole, shows a clear intent to give, the covenantor the option to do the one thing or the other as he may choose to elect."

In a deed of conveyance of land the grantee covenanted for himself, his representatives and assigns, not to erect any building or erection on a specified part of the premises, and provided, that in case of a violation of such covenant, for the payment of fifteen hundred dollars as liquidated damages. On the remaining lands of the grantor was a large building, a part of which abutted upon and had windows opening on the strip of land restricted against buildings and erections, and was dependent thereon for air and light. It was held that by the covenant itself and the surrounding circum-

stances, it was apparent that the primary intent was to have the covenant performed, and thus to secure in permanency an open space for the benefit of the premises not conveyed, and that a court of equity should intervene to enforce observance of the covenant. *Phoenix Insurance Co. v. Continental Insurance Co.*, 87 N. Y. 400 (1882).

In *Howard v. Woodward* (1865) L. J. Rep. 47, a solicitor's clerk executed a bond to his employer, the condition whereof, after reciting an agreement that the clerk should give a bond not to carry on the business of solicitor within fifty miles of a given place, was, that if he carried on the business within the specified distance, then, provided he paid the solicitor one thousand pounds as liquidated damages, the bond should be void. The clerk commenced business within the specified distance. A bill being filed for an injunction by the solicitor, it was held that he was entitled to the relief sought, restraining the clerk from practicing in the specified distance. In this case the bond contained no express covenant on the part of the clerk not to practice. "This was entirely a question of agreement between the parties," said Vice Chancellor Wood. "Was this bond an agreement that the defendant should not practice within the specified distance; or was it an agreement that he might practice there upon payment of one thousand pounds as liquidated damages? The whole object of the agreement appears to be that defendant should not interfere with the plaintiff's business, by practicing as a solicitor in the same neighborhood. It would be a strange construction of the bond to hold that, because it contained no express covenant not to practice, therefore it did not prevent the defendant from practicing, but only prescribed the price to be paid for the privilege."

In an early New York case it was held that injunction will not issue to restrain the breach of a covenant or agreement that the defendant will not exercise or carry on a certain trade or profession within a certain time, within a certain place, where a sum is named in the agreement to be paid for a breach thereof. *Vincent v. King*, 13 How. Pr. (N. Y.) 234 (1856). In this case the court seemed to take a wrong view of the principle involved, as is indicated by the following

language: "The plaintiff having a perfect legal remedy to recover all the damages that the defendant agreed to pay him for violating his covenant, and the amount thereof being fixed, the plaintiff would not be entitled to an injunction to compel the defendant to specifically perform his agreement, if it were conceded that he is insolvent. First, because the defendant may choose to pay the one hundred dollars, for the privilege of exercising the trade of a barber during the year in Owego. Secondly, because the agreement between the parties virtually restricts the plaintiff's remedy against the defendant to the recovery of the one hundred dollars, 'nominated in the bond,' for the defendant's non-performance; and he may be damnified much beyond that sum by being restrained from exercising his trade for one year in Owego. Thirdly, for the reason that this is not a case where the insolvency of the defendant is a sufficient ground for equitable relief by injunction. Such relief might embarrass the defendant in exercising his right to pay to plaintiff the damages liquidated by their agreement, and thus violate the intention of the parties as it is therein manifested. The plaintiff is already entitled to recover the one hundred dollars of the defendant, and that is the extent of his remedy against him either at law or in equity. If the agreement in this case had been simply that the defendant for the consideration of two hundred and fifty dollars, covenanted with the plaintiff not to exercise the trade of barber in Owego for the period of one year, without any sum or forfeiture being stated in it, which the defendant should pay in case of his non-performance, then the plaintiff would be entitled to an injunction restraining the defendant, by reason of the impossibility of accurately calculating the plaintiff's damages; and this would be so whether the defendant be insolvent or not."

It will be noted in this case that the court took the view that upon payment of the liquidated damages specified in the agreement that the defendant was entitled to carry on his trade in violation of the agreement. It is now well settled, of course, that the agreement continues even after the payment of liquidated damages for a breach thereof, and that

plaintiff is entitled to enforce observance of the agreement and waive his right to recover at law, if he so chooses.

It was held that where an agreement to keep secret the principles of a particular invention, contained a clause fixing the amount of damages at a specified sum for breach thereof, the party complaining of a breach could not have an injunction against disclosing the secret. This case proceeded upon the theory that the damages being settled and liquidated in the covenant, the party must be left to pursue his remedy by action at law upon the covenant for the damages. *Nesle v. Reese*, 29 How. Pr. (N. Y.) 382, 19 Abb. Pr. 240 (1865).

The court also held in the case last cited: "Nor does it in my opinion, alter the case because the defendants, Reese and wife have no property. That fact alone cannot disturb the general principle that in the case of a sum settled as liquidated damages, the parties are not usually entitled to an injunction, but must invoke their remedy at law for damages, where there is a violation of the contract. The purchaser here could have provided for such contingency by requiring security, and it is his own fault that he has failed to do so."

The rule in New York, however, has long since been changed, and it is there held that where a company engaged in the manufacture of matches sold its business and good will and covenanted with the purchaser not to engage within ninety-nine years in a like business in any of the United States or Territories, except Nevada and Montana, and which provided for the payment of a certain sum as liquidated damages for the breach thereof, an injunction would be awarded to restrain the breach of such covenant, although the vendor had executed a bond to secure the payment of the liquidated damages. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464 (1887), affirming 35 Hun 421 (1885).

In this case the court said: "In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction was not excluded by the fact that the defendant, in connection with the covenant, executed a bond for its performance,

with a stipulation for liquidated damages. It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, to be accepted by the covenantee in lieu of performance. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. . . . There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed and not that the defendant might at his option purchase his right to manufacture and sell matches on payment of the liquidated damages."

§ 279. — penalty of forfeiture.

Although there is a provision in a lease providing for a forfeiture of all rights thereunder for a violation of certain provisions thereof, injunction will nevertheless lie to restrain the violation of such provision, because a forfeiture of the estate would destroy valuable rights and is not favored by equity. *Ft. Worth Driving Club v. Ft. Worth Fair Assn.*, 103 Tex. 24, 122 S. W. 254 (1909), reversing 121 S. W. 213.

The owner of a tract of land conveyed the same with a condition in the deed to the effect that the vendee, his heirs and assigns, would not make, sell, or permit to be made or sold thereon, any intoxicating liquors on pain of forfeiture of the estate, and giving the vendor the right of re-entry for breach thereof. The defendant violated such condition by selling intoxicating liquors on a portion of the tract, and the plaintiff brought suit to enjoin him. Held, that injunction would issue. *Richards v. Burdsall*, ... N. J. Eq. ..., 10 Atl. 274 (1887).

Although a lease provides that in case of a violation of a restrictive covenant therein against the sale of any beer on the premises except that of a specified kind, that all of the rights of the lessee thereunder shall be forfeited, and although the lessor has declared a forfeiture of the lease on account of a violation of such restriction, still if the lessee ignores such declaration of forfeiture, his rights are measured by the terms of the lease, and he will be enjoined from violating such restrictive covenant. *Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 110 N. W. 746 (1906).

The doctrine of election of remedies does not apply in such a case. That doctrine cannot be successfully invoked against a party, unless it appears that he has pursued one of two co-existing remedies, so inconsistent that the choice of one necessarily amounts to an abandonment of the other. Here, although the plaintiff declared a forfeiture and commenced its action at law for the recovery of its debt, the defendant ignored the notice to vacate the premises, and retained the possession which he had obtained by virtue of the lease. So long as he thus retained the possession, his right, with respect to the use of the premises, must necessarily be measured by the terms of the lease. "It would be a remarkable rule that would give a tenant possession under a lease which he had forfeited greater right than he would have had, had he kept his covenants. It does not seem to us that an attempt to enforce a forfeiture is in any way inconsistent with a suit to compel the tenant to observe the restrictive covenants, so long as he resists the forfeiture and retains possession under the lease." *Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 110 N. W. 746 (1906).

In some of the older New York cases the contrary view was taken. It was held that the breach of a covenant against making alterations in the leased premises would not be enjoined at the suit of the lessor, because the damage to the premises were not irreparable, or such as could not be probably satisfied by law, and for the further reason that under the terms of the lease it appeared that the lessor had reserved the right to re-enter for covenants broken, and might maintain his action to recover possession of the demised prem-

ises. *Trenor v. Jackson*, 15 Abb. Pr. N. S. (N. Y.) 115 (1873).

Equity will not grant specific performance to a lessor of a covenant not to underlet, when he has the right by the terms of the lease, or otherwise, to re-enter for breach thereof. In such a case he must proceed at law, or he may waive the right to enter and recover damages for the breach. Here it is considered that he has an adequate remedy at law. *Gillilan v. Norton*, 6 Rob. (29 N. Y. Super. Ct.) 546 (1867).

However, if the covenant is one not to use the demised premises for a purpose extra hazardous on account of fire, it is a subject of equitable cognizance, and a continuing breach will be enjoined, in order to avoid a multiplicity of actions. *Gillilan v. Norton*, 6 Rob. (29 N. Y. Super. Ct.) 546 (1867).

§ 280. Equity can only enforce agreement as made by the parties.

Where the rights of the parties to a restrictive agreement depends solely upon the contract, the court can only direct performance on the terms specifically agreed upon. It has no right or power to make another or different contract between the parties and then decree specific performance of it as so altered. *Righter v. Winters*, 68 N. J. Eq. 252, 59 Atl. 770 (1905). It cannot disregard the restriction as actually made by the parties and establish one of its own making and enforce observance of the same. And the fact that a number of lot owners in a block, in violating a building line restriction, have erected their buildings in a uniform and symmetrical manner, does not authorize the court, at their instance and against the will of any other lot owner, to establish a new building line which will conform to their buildings. *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84 (1910).

Where both parties to an action to enforce the observance of a restrictive covenant relating to the projection of bay windows and upper stories, have misconstrued the covenant, and bay windows and upper stories of other buildings erected in the restricted territory are violative of the restrictions, and no property owner in the restricted territory except complainant, who is defendant's grantor, objects to defendant's building, which violates the restriction in that the bay window and

upper stories project into the restricted portion of the lot, such violation will not be restrained by mandatory injunction, but the court will leave complainant to his remedy at law for damages. *Righter v. Winters*, 68 N. J. Eq. 252, 59 Atl. 770 (1905).

Relative to this question the court said: "The projection of the second and third stories of defendants' house beyond the fifteen foot line may possibly affect a house built on this lot within the line, but in view of the fact that several other houses built on the block have similar projections in the upper stories, although not so great, and also that the objection made to the defendants while building their house related to the bay window construction and not to these projections, I think the complainants or such of them as are affected thereby, should also be left to their remedy at law for these violations of the covenant."

§ 281. Power of equity to cancel restrictions.

A court of equity may cancel a restrictive covenant because it constitutes a cloud on the title of the property in question, although the reason for cancelling it would constitute a complete defense to any action to enforce its observance. *St. Stephens Protestant Episcopal Church v. Church of the Transfiguration*, 114 N. Y. Supp. 623 (1909), reversing 59 N. Y. Misc. 560, 112 N. Y. Supp. 403 (1908).

In the present case the court said: "As it seems to us the present case is one in which the exercise of a sound discretion requires us to assume jurisdiction to cancel the restrictive covenant. It is being used as a means of annoyance and oppression, not to compel compliance with its restrictions, but to enforce the plaintiff to pay a cash consideration for its release; that defendant has no legal interest in its enforcement; that defendant has declined to take action with a view of having the validity of the covenant judicially determined, and the plaintiff cannot enforce affirmative action on the part of the defendant without abandoning the use of its property for church purposes, and attempting to devote it to secular uses, which it is unwilling to do; and although the covenant is unenforceable, yet it prevents the acquisition by plaintiff

of means to reasonably extend its facilities for carrying on its work as a church, and prevents it from raising funds to meet the defendant's action for the amount of the mortgage debt, an action which, if prosecuted to judgment, will inevitably deprive plaintiff of its property and end its usefulness as a church. These special circumstances, peculiar to this particular case, bring it clearly within the reason and authority of the cases to which attention has been called, and appeals strongly to the equitable jurisdiction of the court."

§ 282. Pleading.—Petition or complaint.

In an action to enjoin the violation of restrictions imposed on property, the complainant must state every fact and every restriction to be relied upon. Nothing can be urged in support of the action that is not set out in the complaint so that the defendant will have an opportunity to meet the same in his defense.

Where a bill alleged that the common grantor of a number of lots adopted a general plan for their improvement which subjected such lots to a restriction against the erection of any building costing less than three thousand dollars, and against their use for certain described purposes, or any other nuisance whatsoever, it was held that no recovery could be had by complainants on representations made by such common grantor to the effect that the premises should be used for a residential sub-division only, as that matter was not pleaded. *Ronan v. Barr*, ... N. J. Eq. ..., 89 Atl. 282 (1913).

In this case complainants' counsel at the hearing and upon the argument urged that it was represented to the complainants at the time they took their deed that the lots were to be used for residential purposes only, and that this representation should be construed in connection with the covenant set out in the bill and enforced as a part of the restrictions. In this respect the court said: "I do not pause the merit of this contention except to note that it is not supported by the evidence, for it is manifest that these representations, if made, form no part of the cause made by the bill. It will be observed that the bill ties the cause for complaint to a threatened violation by the defendant of the restrictions above set out.

The allegation of the bill that the tract was intended and was held out by the company to be used only for residential purposes is pleaded solely by way of inducement. The pleadings and proof clearly show that the limitations on the use of the lots for residential purposes was not to be greater than these restrictions would afford. That this was the understanding of the complainants at the time they purchased is clear, for it appears that they were advised in detail of the terms of the restrictions upon themselves in the use of their lots only to the extent of the covenant contained in their respective deeds."

A complaint alleged that the several plaintiffs owned specified lots in a certain tract of land, and that the defendant owned lot 82 therein; that in order that the said tract of land should become a strictly residential district, the owners thereof sold each and every lot subject to the following covenant: "No building shall be erected on any lot except a private detached dwelling house, which shall cost not less than \$500, and be located not nearer than 25 feet to the front lot line; but a stable or garage may be erected not nearer than 100 feet to the front line, nor nearer than 20 feet to any street or avenue adjoining the side lot. The above covenant shall run with the land and shall bind the purchaser and his heirs, executors, administrators, and assigns until the first day of January, A. D. 1930, when it shall cease and terminate." The complaint further averred that the plaintiffs bought their lots in consideration of all the lots in said tract being subject to the same covenant; that some of them had in reliance thereon built beautiful dwellings and had complied with the covenant; that the defendant purchased his lot subject to the same covenant, except that in the conveyance to him it was specified that the cost of the dwelling house should not be less than \$1,000; that the defendant, in violation of the covenant, had begun the erection upon his lot of an icehouse wherein to conduct an ice business; and that this would be an eyesore in the neighborhood and ruin the said tract for a residential district and depreciate the value of plaintiffs' lots and houses. Held, to state a good cause of action for an injunction. *Velia v. Richardson*, ... Minn. ..., 148 N. W. 286 (1914).

When a third party claims the benefit of a covenant or contract between two other parties, it is incumbent upon him to clearly allege all the facts to establish such claim. *Judd v. Robinson*, 41 Colo. 222, 92 Pac. 724 (1907).

In an action seeking to enforce the observance of a restrictive covenant, unless the complainant is shown to be a party to the deed under which defendant derived his title, it must be alleged that defendant had actual or constructive knowledge of the general plan or scheme of improvement, in furtherance of which such covenant was inserted at the time he purchased his lot. This is in accordance with the rule that an action is not maintainable by one not a party thereto where it does not appear that the covenant was not entered into for the benefit of the complainant alone and formed no part of the consideration for complainants purchase, since the covenant restricting the use of land will not be enforced against a subsequent purchaser without notice, actual or constructive, of the covenant. *Judd v. Robinson*, 41 Colo. 222, 92 Pac. 724 (1907).

A petition seeking to enjoin the violation of a building restriction providing that the land in question "shall be used and occupied solely for the purpose of a private dwelling and a private stable or garage, to be used for and in connection with such dwelling house," which alleged merely that defendants have "constructed certain sheds or outhouses not permitted by, and in violation of, the terms of the contract . . . and in violation of the covenants referred to in the deed of the said premises," and which contained no allegation showing that the shed or outhouse was not to be used in connection with the dwelling or private stable as authorized by the covenant, was held not to state a good cause of action. *Heyson v. Lichtenstein*, 157 N. Y. App. Div. 483, 142 N. Y. Supp. 596 (1913).

With the exception of the words "constructed certain sheds or outhouses," the allegation in the complaint was not a statement of fact or facts, but a conclusion of law. "Unless no shed or outhouse of any description can possibly be erected in connection with a dwelling house or a private stable or garage, without destroying the characteristic use of the land

for these purposes, the complaint is insufficient, and defendant's demurrer on that ground should have been sustained. For anything that appears, the 'shed or outhouse' may have been a storm shed over one of the doors of entrance to the dwelling house, or a wagon shed forming part of the private stable, or it may have been a conservatory or green house."

A bill for injunction to stay waste and prevent the removal of improvements on leased premises, which states that the complainant is the owner and entitled to the possession of the premises with the improvements and that defendants are in possession and threaten to destroy the improvements and that they are insolvent and unable to respond in pecuniary damages, is sufficient on demurrer. *Frank & Co. v. Brunnemann*, 8 W. Va. 462 (1875).

It has been held in Massachusetts, that when a bill is filed in equity to enforce the observance of property restrictions, a copy of the deed containing the restriction should be annexed to the bill. This is for the purpose of apprising the court of the exact language used in the restriction, which is frequently desirable, if not absolutely necessary, and avoids the necessity of the court gathering the substance of the restriction from the pleadings. *Clark v. Lee*, 185 Mass. 223, 70 N. E. 47 (1904).

A mere averment in a petition for an injunction that the applicant will suffer an irreparable injury, unless the injunction be granted, has been held to be insufficient in itself to authorize the issuance of an injunction. *State Bank v. Rohren*, 55 Neb. 223, 75 N. W. 543 (1898).

Although a bill for an injunction to prohibit the violation of a restrictive covenant in a lease prays for relief which a court of equity has no jurisdiction to grant, still if the bill prays for other relief which appears *prima facie* from the bill to be authorized, it is error to sustain a demurrer and dismiss the bill because of want of jurisdiction of the court to grant all the relief prayed for. *Frank & Co. v. Brunnemann*, 8 W. Va. 462 (1875).

§ 283. Pleading.—Answer.

Defenses to the enforcement of restrictive covenants special in their nature must be pleaded in order to be available. This

rule includes such defenses as, that there has been such a change in the neighborhood of the premises burdened with the restriction sought to be enforced that its enforcement would be inequitable; that the complainant has waived or abandoned his rights under the covenant he seeks to enforce; that the complainant has released defendant from the obligation to observe the covenant; that complainant has been guilty of violating the covenant in question; and the like.

In an action to enforce the observance of restrictions against the sale of intoxicating liquors on the premises in question, the defendant, in order to avail himself of the defenses that the restrictions should not be enforced on account of a change in the character of the neighborhood, and that defendant had been permitted to incur considerable expense in fitting his property to use for the sale of liquor without objection on the part of the complainant, they must have been set out in defendant's pleading, and cannot be raised for the first time at the argument. *Haines v. Einwachter*, ... N. J. Eq. ..., 55 Atl. 38 (1903).

In setting up the defense that a change in the character of the neighborhood in the vicinity of property in respect of which it is attempted to enforce observance of restrictive covenants has so changed that it would be inequitable and unjust to enforce observance thereof, it must be alleged that the change in the neighborhood has taken place since the imposition of the restrictions on the property, otherwise such an allegation constitutes no defense to the action.

In an action to enforce the observance of restrictive covenants in a deed, the bill was filed January 30, 1912, and alleged that the deed in question bore date of September 6, 1901, and was executed and delivered on December 16, 1904, and that the deed was then accepted by the grantee, placed on record, and the restrictive covenants thereupon became binding. The answer averred that during the last twenty-five years, and especially in the last ten years, the city in the vicinity in which the premises were located had greatly increased in population; that improvements in transportation facilities had made the vicinity increasingly available for a large population of city dwellers who desired and demanded

to dwell in apartments or flats; that the usual mode of improvement of property in the neighborhood for some years past had been by erecting apartment or flat buildings with walls on the boundary lines of the lots or within less than thirty feet thereof; that so many of such apartment or flat buildings had been constructed in the neighborhood that its predominant character, both immediate and remote, was one dedicated to, adapted for, and used by apartments, flats, or tenement buildings; that many of them had been constructed in violation of restrictions and covenants similar to those defendants were charged with violating, and in many instances the persons violating such restrictions claimed title by conveyance from complainants; and that, owing to the changed condition of the locality, the purpose and object of the restrictions could no longer be carried out. It was held that the averment of the increase in population within the last twenty-five years and more especially within the last ten years, and that conditions in the vicinity of the property involved, remote and immediate, had changed, did not constitute an averment that the changes had occurred since the execution and delivery of the deed containing the restrictive covenants, at which time the covenants in question became operative and binding, and that the answer was on that account insufficient. *Van Sant v. Rose*, 260 Ill. 401, 103 N. E. 194 (1913).

In this respect the court said: "The averment might be true, and still all the changes alleged in the answer have occurred prior to the execution and delivery of the deed. Defendants insist the restrictive covenants should be construed to have come into existence since September, 1901, the day the deed bears date and to have then become obligatory. There is no averment in the bill of the existence of any contract between the parties prior to the execution and delivery of the deed. While it is alleged the deed bore date of September 6, 1901, there is no allegation that it was executed on that date; but the allegation is that it was executed and delivered on or about December 16, 1904. According to the bill, the restrictive covenants were agreed to and became obligatory on that date. If conditions had changed since that time so as to bring

the case within the rule announced in the decisions above referred to, it should have been so averred in the answer, so that a material issue would have been made by filing a replication. The allegations in a pleading, whether a bill or answer, when in any degree equivocal, must be taken in a sense most unfavorable to the party whose pleading is the subject of construction. Tested by this rule, which is too familiar to require the citation of authorities, we are of opinion the circuit court did not err in holding the answer was insufficient."

§ 284. Evidence.—Parol testimony.

A restriction is of the nature of an easement; an easement on land can only be created by deed, or by prescription, which presupposes a grant, hence parol evidence is not admissible to show the existence of a restriction on land. *Tibbetts v. Tibbetts*, 66 N. H. 360, 20 Atl. 979 (1890).

Parol testimony is not admissible to show that there was an understanding when property was conveyed by deeds containing restrictions relative to the use thereof, that a dwelling house for one family on each lot was intended. *James v. Irvine*, 141 Mich. 376, 104 N. W. 631, 12 Det. Leg. N. 454 (1905).

The declarations of a grantor as to his purpose in inserting restrictive covenants in a deed, made just after delivery thereof, are inadmissible in an action to restrain the violation of such restriction. *Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120 (1900).

Where a bill seeking an injunction to restrain an alleged violation of restrictive covenants, sets out and relies upon express provisions in a deed to the property; and does not allege or rely upon representations and a general purpose to make a residential district out of the land, evidence to show that the vendors intended the land to be used for residential purposes is inadmissible. *Ronan v. Barr*, ... N. J. Eq. ..., 89 Atl. 282 (1913).

§ 285. Evidence.—Expert testimony.

Words imposing restrictions on the use of property are generally to be construed according to their generally under-

stood meaning, and the testimony of real estate dealers, architects, and persons who lend money on real estate is not, as a rule, admissible to prove their meaning.

Two adjoining lots were conveyed with the restriction that "only a single dwelling" should be erected on each lot. Held, that the words of the restriction were not words of art, and that it did not appear that they had any peculiar local meaning, and that, hence, the evidence of experts or witnesses could not be received to show the meaning of the words of the restriction, and whether a flat building would be a violation of the restriction. *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391 (1893).

In an action to enforce the observance of a restriction that "no building other than one single dwelling house shall be maintained on said lot," evidence as to the meaning of "single dwelling house" amongst real estate men is not admissible, it being limited to a particular class which did not include the original or subsequent purchasers of the property in question. *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768 (1897).

§ 286. Judicial notice.

Judges must be supposed to be acquainted with the ordinary sentiments, feelings, and sensibilities of the people among whom they live. Hence a court may take judicial notice of the offensive character of an undertaking establishment, where human bodies are prepared for burial, and sometimes embalmed, and subjected to post-mortem examination, carried on in a residence district. *Rowland v. Miller*, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 (1893).

The same rule applies to the character of other well-known trades and businesses.

§ 287. Burden of proof.

When an attempt is made to enjoin a property owner from making use of his premises and building thereon in the usual and ordinary way, the court must be convinced that he or his predecessor in title has taken the premises by a deed which contained a restriction or condition expressed in clear and certain terms, or which contained a promise, agreement, or

undertaking on the part of the grantee clearly expressed, or which contained such terms as have a certain legal operation from which a covenant would necessarily arise. *Gilmore v. Times Publishing Co.*, 18 Pa. Super. Ct. 363 (1901).

When a grantee of land seeks to enforce a restriction, the burden is on him to show that the restriction was intended for the benefit of the property owned by him, and that the defendant took his property with notice of its being subject to the restriction. *Coughlin v. Barker*, 46 Mo. App. 54 (1891).

The burden is upon the defendant in an action on a covenant to show that the erection, either in whole or in part, destroyed the easement. *Lattimer v. Livermore*, 72 N. Y. 174 (1878).

In the absence of a showing of a general scheme under which complainant claims the right to enforce observance of restrictive covenants, the burden is upon him to show that a covenant by the defendant's predecessor in title was made for the benefit of the owners of the lot owned by complainant. *Sailer v. Podolski*, 81 N. J. Eq. 327, 88 Atl. 967 (1913).

In an action to enjoin the violation of a restrictive covenant against the erection of any tenement house, which alleged violation consisted of the erection of a modern apartment house, the burden is on the complainant to show that the building erected is what is known as a "tenement house" within the meaning of the covenant. *Marx v. Brogan*, 111 N. Y. App. Div. 480, 98 N. Y. Supp. 88 (1906).

In an action to enjoin the operation of an electric light plant as being in violation of a restrictive covenant, if the operation can be so altered as to render it unobjectionable under such covenant, the burden is on the defendant to prove this fact. *Scrymser v. Seabright Electric Light Co.*, 74 N. J. Eq. 587, 70 Atl. 977 (1908).

Where a grantee denies the obligation of performing a covenant in his deed, the burden is on him to establish his defense by a fair preponderance of the evidence. *Beck v. Heckman*, 140 Ia. 351, 118 N. W. 510 (1908).

If an intended violation of a restrictive covenant is of a character to be entirely harmless, it devolves upon the defend-

ant to show that fact. *Lattimer v. Livermore*, 72 N. Y. 174 (1878).

§ 288. Issuance of preliminary injunction.

A temporary or preliminary injunction restraining the violation of restrictive covenants may be issued on the complaint alone, provided it be verified and its allegations are positive. *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241 (1884).

Whether or not a preliminary injunction should be granted in a given case is a question whose determination lies largely within the discretion of the court. If it appears that the right to an injunction in the case is doubtful, and that there is no great danger that serious results will follow the withholding of it, it will not be granted.

Where a restrictive covenant in a deed prohibiting the transacting of business on Sunday had been openly violated for several years by defendant grantee and by other grantees of the same grantor, including his tenants, under a like covenant, and where defendant had expended large sums in improving his property in reliance on the grantor's apparent abandonment of the restriction, preliminary injunction was denied the grantor to restrain such violation. *Ocean City Association v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914 (1898).

A deed to a lot conveyed the same without "the right to drill or mine petroleum, carbon oil, or natural gas, which right is not intended to be conveyed, but is forbidden to both parties hereto." The grantor filed a bill to restrain the grantee from violation of this covenant by drilling for oil on the lot conveyed, and it appeared from affidavits that the grantor himself had put down one or more producing wells, on property still remaining in his ownership, but adjoining that he had conveyed to defendant. It was held that as the injury was not irreparable on final hearing, an order refusing to grant a preliminary injunction on plaintiff's motion would not be reversed. *Acheson v. Stevenson*, 130 Pa. St. 633, 18 Atl. 833 (1890).

§ 289. Decree should conform to life of restriction.

Permanent restriction upon the use of real property is contrary to the general policy of the law, and courts of equity

in enforcing compliance therewith will limit the decree to the duration of the conditions and restrictions which formed the basis of the equity calling for such enforcement. *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027 (1905).

An injunction perpetually enjoining the defendant from violating a covenant that by its express terms is to continue for twenty-five years only, is erroneous. *Semple v. Schwarz*, 130 Mo. App. 65, 109 S. W. 633 (1908).

§ 290. Decree for removal of buildings.

A complainant who seeks relief in equity by mandatory injunction to remove a permanently built part of a dwelling house should show a clear and substantial violation of the building restriction, and if he waives his objection to the larger and more prominent part of that which constitutes the violation, his reasons should be convincing and his damage apparent. If he fails in this injunction will be denied. *Willcock v. Arensberg*, 51 Pa. Super. Ct. 73 (1912).

Where the owner of land is erecting a building in violation of restrictions imposed on the use of such land, a court of equity may require him to make his building conform with such restrictions or remove it on failure so to do within a reasonable time. *Maine v. Mulliken*, 176 Mich. 443, 142 N. W. 782 (1913).

If an owner of land not only has constructive notice of restrictions thereon in violation of which he has erected a building, but was also notified both orally and in writing that his building was in violation of such restrictions, equity will decree the removal of such building. *Smith v. Graham*, 147 N. Y. Supp. 773 (1914).

Where complainant acted promptly in seeking to enforce a building restriction against defendant, and the latter proceeded with the construction of his building in violation of the restriction in face of warning from complainant, a court of equity may require the removal of the building from the premises. *Hyman v. Tash*, ... N. J. Eq. ..., 71 Atl. 742 (1908).

In a suit to compel the removal of a building erected in violation of certain restrictions, it was found that the defend-

ant, with full knowledge of the restrictions, deliberately attempted to override them, and thus to deprive the district of the character given it by the restrictions. Held, that defendant took his chances as to the effect of his conduct with his eyes open to the results which might ensue, and that the injunction requiring the removal of the building should issue. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910). "Entrenchment behind considerable expenditures of money," said the court, "cannot shield premeditated effort to evade or circumvent legal obligations from the salutary remedies of equity."

A mandatory injunction requiring that portion of a building erected in violation of a restriction be removed, which would require the tearing out of about half of the front wall space and reconstructing it, will not be withheld merely because the order works a hardship upon the defendant. In a case of this kind where it was contended that such a ruling inflicts unnecessary hardship upon the defendant, and that the plaintiff should be left to her remedy at law to recover damages for the breach of the covenant, the court said: "We do not concur in this contention. The parties have seen proper to embody in their deed a reasonable and usual covenant to establish a building line, beyond which the grantee is forbidden to extend the front wall of his dwelling, and he cannot disregard such covenant (which constitutes part of the consideration of the deed), and in answer to the demand of the plaintiff for a mandatory injunction to abate the obstruction and insist, on the theory of hardship (a hardship of his own creation), that the plaintiff be left to her action at law for damages. 'If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to say by way of injunction, that which the parties have already said by way of covenant—that the thing shall not be done; and in such case the injunction does nothing more than give sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury. It is the specific performance, by the court, of that negative

bargain which the parties have made with their eyes open between themselves.' . . . The amount of damages, and even the fact that the plaintiff has not sustained any pecuniary damages, are wholly immaterial. In the words of one of the ablest modern equity judges, 'It is clearly established by authority that there is sufficient to justify the court in interfering if there has been a breach of the covenant. It is not for the court, but for the plaintiffs, to estimate the amount of damages that arises from the injury inflicted upon them. The moment that the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described, namely, an injunction.' " *Spilling v. Hutcheson*, 111 Va. 179, 68 S. E. 250 (1910).

§ 291. — when building can be altered to conform with restriction.

In an action to enjoin the violation of a restrictive covenant prohibiting the erection of more than one dwelling house on each lot, which has been violated by the erection of a building which can be altered so as to comply with the restriction, the court should allow the defendant an opportunity of altering the same before ordering its removal from the lot. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

Relative to this question the court said: "While we agree with the learned chancellor who tried the case, that the building constituted more than one dwelling and was an infringement of the restrictions on the use of the lot, we do not agree that the proper disposition of the cause was to order the building removed. Courts have some discretion in granting an injunction respecting restrictive covenants affecting the use of lands. They are disposed to uphold such restrictions according to their true meaning and this court is strongly of that disposition. Unless this is done, selfish and aggressive persons will encroach constantly on the rights of their neighbors. Injunctive relief against these encroachments is the only true remedy, and ought to be granted promptly in as full a measure as needed to insure perfect protection to all

parties in the enjoyment of covenants made for the common benefit. But when relief is granted against such encroachments, it should be made as lenient as consistent with enforcing the rights of the complaining parties. In our opinion the building in the present case can be altered so as to constitute one dwelling within the meaning of the deeds, at comparatively little expense, and the evidence so shows. It cost thirteen thousand dollars, and is of superior construction and attractive appearance. A few hundred dollars will pay for converting it into a single dwelling house. It was the duty of the court to afford the defendants an opportunity to make the alteration."

A grantee covenanted in a deed of conveyance of a lot of ground to him not to erect or permit the erection and carrying on thereon of a tenement house, and not to erect any houses except private dwellings thereon. The grantee erected a building thereon which was divided into three floors, each of which was finished so as to accommodate a separate family, and did not meet the requirements of the covenant respecting the private dwelling clause only so far as the interior arrangements were concerned, and could be remedied possibly by alteration. Held, that the proper remedy was to enjoin its use as a tenement house or using it for any other purpose than for a private residence, and not to order the destruction of the entire building. *Levy v. Schreyer*, 177 N. Y. 293, 69 N. E. 598 (1904), modifying 71 N. Y. App. Div. 616, 76 N. Y. Supp. 1018 (1902).

§ 292. Decree when use, and not construction, of building constitutes the violation.

Where the construction of a building on restricted property is not in violation of the restriction, but merely the use to which it is intended to be put would be violative thereof, a court of equity may enjoin the use of the building for such purpose, although permitting it to be used for other purposes, not violative of the restriction. Even if a defendant should be ordered to take down such a building, upon the ground that it was originally constructed for a use inconsistent with the restriction, it is manifest that he might immediately erect

one exactly its duplicate for the purposes of a use not inconsistent with the restriction. And although the restriction prohibits the erection of a building for a certain purpose, and the building is erected for that purpose, but its use subsequently changed to conform to the restriction, equity will not require its removal. *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730 (1911).

In the case last cited, it was said by the court: "Under these circumstances we think that justice will be done by a decree which will simply compel defendants to cease the illegal use, and, further, to remove the building unless it be used for a purpose not inconsistent with the restriction. There should be a decree for the plaintiffs forbidding the use of this building as a garage or a storehouse for an automobile, and for its removal unless it be used for a purpose not inconsistent with the restriction."

Where the owner of land subject to a restriction prohibiting its use or occupancy for any except residence purposes, which was expressly made to exclude flats and apartment houses, commences the erection of a building in violation thereof, and is warned that he is violating the covenant, and thereupon promises to change the plans so as to come within such restriction, but violates such promise and erects the house, which is a duplex or apartment house, these facts are sufficient to justify equity in granting relief against possible future use of the house in a forbidden way, notwithstanding the fact that at present it is not so used. Although the house in such a case is erected within the terms of the covenant, yet inasmuch as under such circumstances equity can be accomplished without resorting to the harsh expedient of removing the house, its removal should not be ordered. *Kenwood Land Co. v. Hancock Investment Co.*, 169 Mo. App. 715, 155 S. W. 861 (1913).

§ 293. Decree for injunction and damages.

It is a well settled principle that a court of equity, having acquired jurisdiction of the subject matter of an action, for any purpose, may retain jurisdiction of it to do justice between the parties. It may, therefore, not only interfere to

prevent a continuance of a violation of a restrictive covenant, but also compensate the party prejudiced in damages for any injuries sustained by such violation. *Gillilan v. Norton*, 6 Rob. (29 N. Y. Super. Ct.) 546 (1867).

§ 294. Alternative decree for injunction or damages.

In an action to restrain the violation of a restrictive covenant prohibiting the erection or maintenance of a stable on the premises in question, where it appeared that the stable had been completed, and that the building on the dominant owner's lot was an apartment house, and not his home, it was ruled that an injunction would be granted subject to be avoided on payment of the damages caused to the dominant owner's property. *Equitable Life Assurance Society v. Brennan*, 24 N. Y. Supp. 784, 30 Abb. N. C. 260 (1893).

In this case it was said by the court: "If the plaintiff's structure were a private dwelling house, built by a person as a home and permanent abiding place, it would seem that it would be unjust for equity to deny to the plaintiff an injunction, and to attempt to measure the wrong committed by the defendant with money; but the plaintiff's structures are what are known as 'flats' or 'apartment houses,' and upon the trial of the action the amount of damages which the plaintiff would sustain by the reason of the use of the defendant's premises as stables was proved by competent testimony. Equity has jurisdiction to mold its relief in accordance with what is right under all the circumstances. The defendant's buildings are completed, and the chancellor should hesitate to issue an injunction, for it would appear that the defendant's buildings can be used for no other purpose than that of private stables, when money will compensate the plaintiff for the defendant's wrongful act. Equity, having jurisdiction, may undoubtedly give whatever relief is deemed most appropriate. . . . The use of Fourth avenue as a railroad avenue has increased materially during the past few years. The injury which the plaintiff will suffer from defendant's wrongful act can be measured, and just compensation made therefor in money; so, under all the circumstances, and in view of all the facts of the case, the decree should be

that an injunction issue as prayed in the complaint, unless defendant, within sixty days after the entry of the judgment to be entered herein, pays to the plaintiff the sum of ten thousand dollars, with interest at six per cent from the date of the entry of such judgment; and, upon the payment thereof, the plaintiff must deliver to the defendant a proper release from the covenant in question, so far as it restricts the use of the defendant's premises for the purposes of private stables, such as the defendant has now erected upon his premises."

§ 295. Denial of injunction and granting of damages.

Although equity will not enforce compliance with restrictions on property, it may still retain the bill for the purpose of assessing damages in favor of the plaintiff. *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476 (1892).

Where a complaint stated both a cause of action for damages for the violation of a restrictive covenant, and also one for an injunction against the maintenance of the residence constituting such violation, it has been held in California that the court may properly award damages and refuse to grant an injunction. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157 (1912).

In this respect the court said: "The only other point made by the appellant is that the judgment, denying to plaintiff the injunction which she sought, and giving her damages alone, cannot stand. Quoting from appellant's brief, his contention is that, 'The giving of damages by the court is an alternative remedy, which may be administered in place of the injunction, but there is no right to damages independent of an injunction.' No sufficient reason in support of this claim is suggested, and none occurs to us. The complaint stated two causes of action, one seeking equitable, the other legal relief. If plaintiff's rights were invaded as the findings show they were, she is entitled to recover such damages as she sustained, notwithstanding the conclusion of the court that the equitable remedy of injunction should not be granted."

§ 296. When decree should be subject to modification.

In a suit to enjoin the defendant from violating a restrictive building covenant, the injunction should not be made so as to prevent defendant from applying for a modification thereof in case there should come such a change in the character of the neighborhood as to render the enforcement of the covenant inequitable. *Misch v. Lehman*, ... Mich. ..., 144 N. W. 556 (1913).

In the last cited case the court said: "The decree of the lower court perpetually enjoins defendants from proceeding with the construction, erection, or maintenance, or causing to be constructed, erected, or maintained, any flat, double house, apartment, or any other building except a single dwelling house, intended or suitable for the separate occupancy for one family. It further perpetually restrains defendants from doing any act which will in any wise be a violation of the building restrictions on the lot in question.

"Defendants claim that this decree is too broad and far-reaching in its terms. They contend that the only question litigated in the present proceeding is the right of defendants to erect a four family flat at this time; other features of the restriction and the possible development in the future as they might bear upon the restriction were, it is said, not in issue. While it seems doubtful that any future development will so change the situation as to make the enforcement of the restriction inequitable, it is not unreasonable that the decree should be so modified as to protect the defendants in case such a radical change should occur in the future."

Permanent restrictions on the use of real property being contrary to the general policy of the law, a decree granting an injunction against the violation of such restrictions should be made subject to the right in the defendant or his assigns to have the same thereafter dissolved for any sufficient cause which may be shown. The jurisdiction invoked in such cases is purely equitable, and in a sense discretionary, and its exercise should extend no further than equity, conscience and justice demand. Therefore, the decree should be so entered that, in the event of such changes in the future, or such conduct on the part of complainant or those claiming under him,

as would make the burden of the restriction inequitable and oppressive, the coercive power of the court may be withdrawn and the parties left to the pursuit of such legal remedies as they may have. *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027 (1905).

The appellate court will not necessarily reverse the decree in an action to enjoin the violation of building restrictions merely because it is too broad, but it may either modify the decree or remand the case to the lower court with directions to do so. *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911).

§ 297. Construction of decree.

A court decree ordering the removal of a building or projection which has been erected in violation of a property restriction, must be construed in the light of what was brought to the court's attention at the trial.

A decree stated, in ordering the removal of bay windows, that "the said inner bays with the foundation walls sustaining the same are to be removed, . . . so that the entire space between the said porch and the outer or planking bays on each side of said porch shall be on the same face as the main front wall." At the trial no evidence was taken, fact found, or argument made as to the foundations. Held, that the words "the said inner bays with the foundation walls sustaining the same are to be removed," were limited by the words "so that the entire space . . . shall be on the same face as the main front wall," which declared the end, and the only end, to be accomplished, and that the decree properly construed did not require the removal of foundations under the ground. *Attorney General v. Algonquin Club*, 155 Mass. 128, 29 N. E. 209 (1891).

§ 298. Actions for damages.

An action for damages may be maintained for the violation of a restrictive covenant by the person for the benefit of whose land the restriction was imposed. *Leader v. La Flamme*, ... Me. ..., 88 Atl. 859 (1913).

Although a plaintiff may fail in his action in equity to restrain the violation of a restrictive covenant, he may still

sue at law and recover damages, if he can show that he has sustained any. *Orne v. Fridenberg*, 143 Pa. St. 487, 22 Atl. 832, 24 Am. St. Rep. 567 (1891).

Where by reason of changed conditions it would be inequitable to enforce the observance of restrictive covenants, a court of equity may deny such relief, and at the same time in lieu thereof award damages for such breach. *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741 (1892).

Under the practice adopted in many cases, the trial court, in awarding damages in lieu of an injunction, may properly require the plaintiff, upon the receipt of the damages awarded, to execute and deliver to the defendant a release from the covenant in respect of which an injunction was sought. While it may be that such a requirement is not necessary to bar a further action for damages, it seems but just that the release should be given. *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741 (1892).

§ 299. Actions for successive violations.

In an action to recover damages for the breach of a covenant to keep a certain gate in repair, and to close the same in passing and repassing, it was held that a recovery for one breach did not affect the right to bring a future action for the recovery for another breach. *Crain v. Beach*, 2 Barb. (N. Y.) 120 (1848).

Plaintiff conveyed to defendants a right of way and the latter covenanted to keep in repair a certain gate to be erected by the plaintiff across such way, and to use common care in shutting such gate in passing and repassing the same. It was held that if the defendants allowed the gate to become out of repair, or should allow it to remain open, they would be responsible for damages, and the measure thereof would be determined by the amount of the plaintiff's loss by reason of the breach proved at the trial of the cause. *Crain v. Beach*, 2 Barb. (N. Y.) 120 (1848).

§ 300. Measure of damages.

In an action to recover damages for the breach of a restrictive covenant, where the covenant is such that there can be

but one breach and but one recovery, the jury, in assessing the damages, are not limited to the time of the institution of the suit, but are at liberty to allow damages for such permanent injury to the plaintiff as they might find that he sustained. *Jacobs v. Davis*, 34 Md. 204 (1870); *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741 (1892).

Where an action was brought to require the removal of a foundry, which was maintained in violation of restrictive covenants, and the foundry was removed during the pendency of the suit, the measure of damages was the loss occasioned to the plaintiff by reason of the operation of the foundry during the period of the continuance of the violation of the covenant. If the property had been physically injured by the sulphur, fumes, smoke and ashes it would be proper for the jury to consider that, as well as the effect upon the rental value of the property. It was declared to be error, however, to allow the jury to consider the difference between the market value of the property with the foundry in operation and with it removed. *Immel v. Herb*, 50 Pa. Super. Ct. 241 (1912).

The owner of a building leased the same for the purposes of a hotel, and covenanted in the lease not to let an adjoining building which she owned for the purposes of a hotel, or any similar business, nor to keep therein any such business for herself. In an action brought by the lessee against the lessor for breach of such covenant, it was held that the measure of damages should be the amount of loss the plaintiff had sustained and the profits of which he had been deprived. It was held that evidence that the daily receipts of the plaintiff fell off or decreased a certain amount, after a similar business was opened by the lessor in the adjoining building, because the customers who frequented plaintiff's house resorted to the other, did not meet the standard so established relative to the measure of damages. Such evidence did not show the profits plaintiff would have made out of such customers who left him, as the aggregate of the decrease or falling off in the receipts was not shown to be exclusive of the expense of conducting the business. Further the court said: "In addition to these considerations, the difficulty of showing that plaintiff would have received the benefit of the patronage of these cus-

tomers, had the adjoining establishments not been opened, contrary to the contract (which has not been attempted), inclines us to more readily apply the rule that, 'to recover, one must make his claim certain; to make it only probable is not enough.' The plaintiff has not established, with legal certainty, the amount of damages actually sustained by him. We cannot assume that the whole or any given part of the amounts named by the witnesses, as the diminution of receipts, is the amount of the loss he has sustained and the profit of which he has been deprived." *Smith v. Thielen*, 17 La. Ann. 239 (1865).

In a suit to enjoin the erection of a building in violation of a restriction, where complainant alleged in her bill that its erection would damage her property, it was held not to be error to admit testimony that the proposed building would damage the plaintiff's property one thousand dollars, the witness also testifying that the property was worth thirty-five hundred dollars before the proposed erection, and would be worth only twenty-five hundred dollars if the building was erected as attempted by the defendant. *Seawright v. Blount*, 139 Ga. 323, 77 S. E. 152 (1912).

Plaintiff and the defendant railroad company derived title to their land from a common source, and there had been imposed on the use of the lands of both a restrictive covenant against offensive establishments. The railroad was constructed in 1887, and in a number of deeds prior to and since the construction of the road no reference was made to the covenant in question, but it was mentioned in the deed to plaintiff, who took title to his property in 1905. Plaintiff's property consisted of a lot covered with a four-story brick building, used as a store on the ground floor and as apartments on each of the floors above. The defendant's property was a private right of way, on which it operated an elevated railroad. It appeared that since 1875 the neighborhood had been changing from a residential one to a manufacturing center, and at the present time was given up almost wholly to business, and whatever change took place in the neighborhood could not be assigned to the operation of defendant's railroad. Held, that the evidence was insufficient to show damages for

the breach of such restrictive covenant. *Antes v. Manhattan R. Co.*, 116 N. Y. Supp. 697 (1909).

§ 301. Special damages.

It is a rule of law that where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either naturally arising, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of it. If the special circumstances under which the contract was actually made were communicated and made known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such breach of contract. *Greene v. Creighton*, 7 R. I. 1 (1861).

The owner of a building lot which was subject to a restriction prohibiting the erection of any building within eight feet of the street line, built a barn on the rear part of the lot, and contracted for the building of a house on the front of the lot within one foot of the street line, and to lease it for five years. In thus placing his house there would be a distance of nineteen feet between the house and the barn, but just as he commenced digging the cellar he learned of the restriction, and was compelled to place his house back and within eleven feet of the barn, which so narrowed the yard in the rear of the house, and brought the latter so unpleasantly near the barn, that, to satisfy and compensate his tenant of the house under the contract for letting the same, he was obliged to make outlays upon it, additional to those stipulated, amounting to

§507.21. Plaintiff had purchased his lot about two years previous to the making of such contracts, and took it with a covenant in the conveyance against incumbrances. He brought suit for damages against the grantor for violation of the covenant against incumbrances, and alleged this item of \$507.21 as special damages. It did not appear that the special uses for which the plaintiff bought the lot were known to the defendant at the time of sale, nor formed any part of the basis of the contract between him and the plaintiff. It was held that such special damage was neither the natural nor proximate consequence of the existence of the incumbrance stipulated against, but arose out of certain particular uses for which plaintiff purchased the lot, not communicated to or known by the defendant, and not possible to the plaintiff except as the owner of an adjoining estate, and also, out of a certain collateral undertaking of the plaintiff with regard to the building upon and leasing of his purchase, entered into long subsequent to the deed and covenant of the defendant, and could not be recovered by him. *Greene v. Creighton*, 7 R. I. 1 (1861).

§ 302. Nominal damages.

Where the plaintiff proves the breach of a restrictive covenant, the law implies at least nominal damages, but unless there is proof of substantial damages nothing more than nominal damages can be recovered. *Coppinger v. Armstrong*, 8 Ill. App. 210 (1881).

It has been held that the rule that a new trial will not be granted merely to enable the plaintiff to recover nominal damages, has no application where a recovery of nominal damages is necessary to protect a property interest of the plaintiff. This was so held in an action to enforce a restrictive building covenant, and which was dismissed by the trial court on the ground that the plaintiff had suffered no damages, although it appeared that the covenant had been violated. *Skinner v. Allison*, 54 N. Y. App. Div. 47, 66 N. Y. Supp. 288, 8 N. Y. Anno. Cas. 155 (1900). In such a case the breach of the covenant is sufficient to entitle the plaintiff to nominal damages.

§ 303. Damages where restriction constitutes breach of covenant against incumbrances.

Where a restriction on the use of land, the fact of the existence of which constitutes a breach of a covenant against incumbrances, is a benefit instead of a detriment to the land, the purchaser can recover only nominal damages for such breach of covenant. *Greene v. Creighton*, 7 R. I. 1 (1861).

Where an action is brought to recover damages for a permanent restriction on the use of the premises as constituting a breach of a covenant against incumbrances, and the release of the incumbrance cannot be enforced in any court, which renders it practically inextinguishable, the measure of damages consists in the difference in the value of the land without and with the incumbrance. *Streeper v. Abeln*, 59 Mo. App. 485 (1894).

Thus, the purchaser of land found it to be incumbered by a right granted by deed of a former owner, to a canal company to pass and repass upon the land along the canal within two rods of the bank, for the purpose of cleaning and repairing the canal, upon paying the owner reasonable damages. In an action for breach of the covenant against incumbrance, it was found that the actual damages in the exercise of the right at the time of the suit was ten dollars, but that the land was worth seven hundred and fifty dollars less by reason of the incumbrance. It was held that the plaintiff was entitled to recover the seven hundred and fifty dollars. *Mitchell v. Stanley*, 44 Conn. 312 (1877).

§ 304. Counterclaim in action for damages for breach of restriction.

Where an action is brought by one party, and the covenants are mutual, and have been performed in part only by the plaintiff, and the defense does not go to the whole consideration, it is proper for the defendant to reduce the damages by showing those that he has sustained by failure of the plaintiff to perform on his part. It was said that in many, and perhaps most of the cases of mutual covenant, those of one party formed the consideration for the covenants entered into by the other, and that justice would be much promoted by allow-

ing the reduction of the damages claimed, instead of compelling the defendant to resort to his cross action, whenever there is shown a partial performance of the covenants. *Greene v. Linton*, 7 Port. (Ala.) 133, 31 Am. Dec. 707 (1838); *Hill v. Bishop*, 2 Ala. 320 (1841).

CHAPTER IX.

PERSONS BY AND AGAINST WHOM RESTRICTIONS MAY BE ENFORCED.

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§ 305. Classes of restrictive covenants.

While there are many different kinds of restrictive covenants, some of which may not come within this classification, generally speaking covenants of this kind may be divided into three classes. In the first class are all those imposed for the purpose of carrying out a general scheme for the improvement or development of real property. It embraces all the various plans under which an owner of a large tract of land divides it into building lots to be sold to different purchasers for separate occupancy, by deeds which contain uniform covenants restricting the use which the several grantees may make of their premises. In such cases the covenant is enforceable by any grantee as against any other upon the theory that

there is a mutuality of covenant and consideration which binds each, and gives to each the appropriate remedy. Such covenants are entered into by the grantees for their mutual protection and benefit, and the consideration therefor lies in the fact that the diminution in the value of a lot burdened with restrictions is partly or wholly offset by the enhancement in its value due to similar restrictions upon all the other lots in the same tract.

The second class embraces those cases in which the grantor exacts the covenant from his grantee, presumptively or actually for the benefit and protection of contiguous or neighboring lands which the former retains. In such cases the grantees, if there are more than one, cannot enforce the covenant against each other, so the grantor, and his assigns of the property benefited, may enforce it against either or all of the grantees of the property burdened with the covenant.

The third class is where there are mutual covenants between owners of adjoining lands in which the restrictions placed upon each produce a corresponding benefit to the other. In such a case either party or his assigns may invoke equitable aid to restrain a violation of the covenant. *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 687, 37 L. R. A. (N. S.) 1, 127 Am. St. Rep. 925 (1908).

In *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. Rep. 11, Justice Farwell mentioned three classes of restrictive covenants as follows: "First of all there is the case of where the vendor simply obtains a covenant from the purchaser for his own benefit; the second is where the vendor obtains covenants from the purchaser for his own benefit in his capacity as owner of a particular property; and the third is where the covenant is entered into for the benefit of the vendor, in so far as he reserves unsold property, and also of other purchasers as part of what is called a building scheme."

§ 306. Generally.

Equity will enforce covenants not only between prior grantors and grantees, in regard to the use of the property, but against subsequent owners affected with notice thereof.

Trudeau v. Field, 69 Vt. 446, 38 Atl. 162 (1897); *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583 (1899).

The violation of a restrictive covenant creating a negative easement may be restrained at the suit of one who owns property for whose benefit the restriction was established, irrespective of whether there was privity, either of estate or of contract, between the parties, or whether an action at law is maintainable. *Silberman v. Uhrlaub*, 116 N. Y. App. Div. 869, 102 N. Y. Supp. 299 (1907).

In order that a party may maintain an action to enforce the observance of a restriction on property, it must clearly appear that the covenant was intended for his benefit. If the covenant is silent; if there is no mutual agreement or understanding between the various owners creating the restriction; if there is nothing in the surrounding circumstances from which mutual rights can fairly be inferred, then no action can be maintained. *Equitable Life Assurance Society v. Brennan*, 148 N. Y. 661, 43 N. E. 173 (1896).

The right to sue for breach of a restrictive covenant running with the land is held to rest exclusively in the last covenantee, and an intermediate covenantor has no right of action thereon until he has reimbursed such subsequent covenantee. *Allis v. Foley*, ... Minn. ..., 147 N. W. 670 (1914).

The vendor of certain lots required the purchaser to covenant against the erection of any livery stable on the premises sold, and himself covenanted that not more than two houses should be erected on the remaining land owned by him. Held, that the purchaser was entitled to an injunction restraining the vendor from erecting a livery stable on the remaining land. *Schenck v. Campbell*, 11 Abb. Pr. (N. Y.) 292 (1860).

The parties against whom restrictive covenants may be enforced are the grantees who accept deeds containing the restrictions, and all those who subsequently purchase the restricted land with notice of the covenants. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583 (1899).

Where a deed containing restrictive covenants in favor of the grantor's land is made subsequent to another deed to part

of his land, the grantee in the latter can claim no rights thereunder. *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 Atl. 14 (1901), affirmed in 63 N. J. Eq. 804, 52 Atl. 1132 (1902).

The acceptance by a grantee of a conveyance containing a covenant restricting the use of the premises granted, is equivalent to an express agreement on his part to perform the same; and the title of his grantees is affected by this obligation. *Atlantic Dock Co. v. Leavitt*, 50 Barb. (N. Y.) 135 (1867).

✓ A grantee who accepts a deed with a covenant imposing duties upon him is as much bound by such covenant as though he had signed and sealed the deed. *Druecker v. McLaughlin*, 235 Ill. 367, 85 N. E. 647 (1908).

✓ When a person sells land to another to be used for an express purpose, he will not be permitted to derogate from his own grant by doing anything on adjacent land which unfits the land sold for the purposes for which it was sold. *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961 (1889).

— It has been held that where the owner of land sells the same and the grantee covenants relative to the use thereof, the personal representative of the vendor after the latter's death cannot maintain an action for injunction against an assign of the purchaser in respect of a breach of the covenant committed after the vendor's death. Such a covenant was held to be merely personal, as the grantor owned no interest in any land in the vicinity of that sold. *Formby v. Barker*, (1903) 2 Ch. 539.

A stipulation in a deed to land as part consideration thereof, whereby the grantee agrees for himself, his heirs and assigns, that the premises shall not be used or occupied as a hotel so long as certain other property of the grantor shall be used for that purpose, is binding on the grantee and all claiming under him, and may be enforced by injunction. *Stines v. Dorman*, 25 Ohio St. 580 (1874).

§ 307. Persons not parties to the restrictive agreement.

Questions as to the right of persons not parties to restrictive covenants and agreements to enforce them have arisen under various conditions. In some cases there has been a general

plan or scheme, where each party has bought with reference to the general plan, and the agreement entered into the purchase of each piece of property, and in such cases the agreement is enforceable between grantees. Another class of cases is where the vendor has sold a part of his lands and imposed a restriction upon the lands retained in favor of those sold. Still another class is where the owner sells a part of his premises and imposes a restriction on the purchaser by which the lands retained will be benefited.

The principle upon which a person not a party to a restrictive covenant is permitted to enforce it, is based upon the idea that the subsequent purchaser of lands to be benefited by the enforcement has made his purchase and paid his consideration in the expectation of the benefit to accrue to the land bought, from the observance of the restriction imposed by his grantor upon the use of the lot previously conveyed to the covenantor, and no injustice is worked upon the covenantor or his assigns with notice of the covenant by restraining them from using the land in a manner inconsistent with the contract under which they obtained the title and which fixed the price they paid with relation to the restriction imposed. But this rule, while operative to enable a subsequent purchaser of land to be benefited by restrictive covenant to enforce it against a prior purchaser, who made it, and against his assigns, with notice of it, does not work inversely to support the claim of a prior purchaser from the original owner to enforce a restriction imposed by the latter upon a lot subsequently conveyed. The prior purchaser did not buy in expectation of any benefit to be derived from the subsequent covenant not yet in existence, nor did the subsequent purchaser make his covenant with the common grantor with relation to land which the latter had previously conveyed and in which he had no interest. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583 (1899).

The violation of a restrictive covenant creating a negative easement may be restrained at the suit of one who owns property for whose benefit the restriction was established, irrespective of whether there was privity either of estate or of contract between the parties or whether an action at law

is maintainable. *Silberman v. Uhrlaub*, 116 N. Y. App. Div. 869, 102 N. Y. Supp. 299 (1907).

In a New York case it was held that the rule is well established that where a covenant in a deed provides against certain uses of the property conveyed which may be noxious or offensive to the neighboring inhabitants, those who have suffered from a breach of such covenant, though not parties to the deed, will be afforded relief in equity. *Gibert v. Peterler*, 38 N. Y. 165, 97 Am. Dec. 785 (1868).

Where a party complainant to a suit to enforce the observance of building restrictions fails to show that he was a party to the restrictive covenant, or that the covenant was made for his benefit, he cannot maintain such action. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

§ 308. — illustrative cases.

The owner of two adjoining lots conveyed one of them, and in the deed the grantee covenanted for himself, his heirs and assigns, not at any time thereafter to "erect or put up or suffer or cause to be put up or erected any building or part of a building or other obstruction except a bath house and privy and walls not exceeding eight feet in height from the level of the ground," on the lot extending south of a line fifty-nine feet from the street. Many years thereafter the grantee's successor in title began the construction of a bath house extending from the rear wall of his house into the restricted portion of the lot, which was over nine feet high. Held, that the owner of the adjoining lot was entitled to an injunction, as the purpose of the parties to the original deed was to create an easement of light and air in favor of his lot. *Meigs v. Milligan*, 177 Pa. St. 66, 35 Atl. 600 (1896).

Where the owner of a tract of land, near the center of which his residence was located, sold a number of lots therefrom and inserted in the deeds certain building restrictions, the restrictions were not only for his benefit, but were for the benefit of the purchasers to whom he sold the adjacent lots, although such purchasers were not parties to the deeds to which the conditions first appeared. *Roberts v. Porter*, 100 Ky. 130, 37 S. W. 485, 18 Ky. L. Rep. 650 (1896).

A restrictive covenant provided that "no building or other structure shall be built or erected on the land herein described and conveyed further east, or nearer A avenue, than is the house or building directly south of said property." The property adjoining on the south had once been owned by the grantor, but he had conveyed the same to his daughter prior to the conveyance in question. Held, that it was not sufficiently apparent that the restriction was for the benefit of the daughter's lot. *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040 (1902).

The owner of several lots conveyed one to defendant subject to the restriction that "no out-buildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon." Subsequently he conveyed an adjoining lot, with all the rights, easements, privileges and appurtenances thereto belonging, which was afterwards conveyed to the plaintiff by deed containing no express mention of the restriction. Held, that the restriction did not so appear to have been inserted for the benefit of the plaintiff that equity would enforce it. *Badger v. Boardman*, 82 Mass. (16 Gray) 559 (1860).

"There is an entire absence," said the court, "of any language in the deeds under which the parties claim, from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to inure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed. Nor is there any language in the deeds under which the plaintiff claims title, which refers specifically to this restriction, or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate. Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed. But the conveyances in the present case contain

no such clause, nor is there anything in the terms of the grant, or in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it might have been intended by the parties for the benefit of the grantor only so long as he remained the owner of any of the land of which that conveyed to the plaintiff originally formed a part. However, this may be, it is certain that the defendant took his grant without any notice, either express or constructive, that this restriction was intended for the benefit of the plaintiff's estate. This is the material distinction between the case at bar and that of *Whitney v. Union R. Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715 (1858). And it is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle, that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff, which in equity, by accepting the grant, the defendant would be bound to observe. We are therefore of opinion that the clause in the deed to the defendant, creating the restriction on the enjoyment of his estate, must be construed as a personal covenant merely with the original grantor, which the plaintiff cannot ask to have enforced in this suit."

The original owner of a tract of land subdivided it and prepared a plan, which stated that none of the lots should be occupied by any building used as a stable. Some lots were sold with the restriction against private stables, while others were conveyed without such restriction, and at public sale of both plaintiff's and defendant's lots it was announced that the restriction would not be enforced against them. Held, that the plaintiff had no right to restrain defendant from using in a proper manner a stable on his lot, although the restriction was in defendant's deed and the plaintiff knew nothing of the announcement. *Beals v. Case*, 138 Mass. 138 (1884).

§ 309. Prior and subsequent purchasers.

In order to entitle prior purchasers from a common vendor, or those claiming under them, to enforce restrictions placed

upon lots subsequently sold, it must be shown that they are a part of a general plan adopted for the development and improvement of the property by laying it out in streets and lots, prescribing a uniform building scheme, regulating size and style of houses, or uses to which the buildings may be put. When there is such a general plan and covenants imposing uniform restrictions, each purchaser as he buys his lot and accepts the restrictive covenants, pays his purchase money in consideration of and relying upon the subsequent execution of the general plan by the imposition of like covenants upon succeeding purchasers. This equity arises in favor of a grantee under the restriction of the uniform plan, as well against the original owner who promulgates and sells lots on the general plan and attempts to make subsequent conveyances in avoidance of it, as against a grantee who accepts a deed with the restrictions, and does an act in breach of them. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583 (1899).

Where a general development or building scheme has been adopted by a common owner and perpetuated through the medium of uniform restrictive covenants in all deeds made by such common owner, each purchaser may enforce the uniform covenants against all other purchasers irrespective of the time or order of their respective purchases, because such a general scheme can only exist as such by reason of its necessary comprehension of a plan to subject the entire tract to the operation of the uniform covenants. *Sailer v. Podolski*, ... N. J. Eq., 88 Atl. 967 (1913); *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675 (1909).

Where, however, there is no such general scheme, and where neither the instrument containing the covenant or any other instrument provides that similar covenants shall be inserted in subsequent deeds to be made by the grantor of his remaining land, nor in any other way restricts the grantor in the use or disposition of his remaining land, nor provides that the covenant is for the benefit of subsequent purchasers of all or any part of the unsold land of the grantor, nor that it may be enforced by such subsequent purchasers, it may well be doubted whether any satisfactory ground can be found to support a claim of right of a subsequent purchaser from the

grantor to enforce the covenant. *Sailer v. Podolski*, ... N. J. Eq. ..., 88 Atl. 967 (1913).

"Where a uniform plan of improvement, restricting the use to which each parcel of a tract can be put, is adopted, and parcels are sold in reference to such plan, mutual negative easements are created irrespective of the order of the conveyances and of whether the restrictive covenant is expressed in the deed." *Silberman v. Uhrlaub*, 116 N. Y. App. Div. 869, 102 N. Y. Supp. 299 (1907).

In *Nottingham Brick & Tile Co. v. Butler*, 16 Q. B. Div. 778, 54 L. T. Rep. 444 (1886), Lord Esher, M. R., referred to two lines of cases to be found in the books respecting the right of subsequent grantees to enforce restrictive covenants imposed on other property. "The first is," he said, "where there has been a sale of part of a property, with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others."

In the English case of *Elliston v. Reacher*, (1908) 2 Ch. 374, 77 L. J. Ch. 617, 99 L. T. Rep. 346, affirmed in (1908) 2 Ch. 665, Justice Parker laid down four essentials that must be present in order to entitle any one of the grantees of lots in a tract of land to enforce observance of restrictive covenants imposed thereon by any of the other grantees. First, that both the plaintiffs and the defendants derived title under a common vendor; second, that previously to selling the lands

to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots, subject to restrictions intended to be imposed on all the lots and which, though varying in detail as to particular lots, are consistent, and consistent only with some general scheme of development; third, that those restrictions were intended by the common vendor to be, and were, for the benefit of all the lots intended to be sold, whether or not they were also intended to be, and were, for the benefit of other lands retained by the vendor; and, fourth, that the plaintiffs and defendants, or their respective predecessors in title, purchased their lots from the common vendor upon the footing that the restriction subject to which the purchases were made were to inure to the benefit of the other lots included in the general scheme, whether or not they were also to inure to the benefit of other lands retained by the vendor. He then continued: "If those four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor, irrespective of the dates of the respective purchases. I may observe that with regard to the third point the vendor's object in imposing the restriction must in general be gathered from all the circumstances of the case, including, in particular, the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the value of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he may retain other land, the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may usually be inferred, provided the purchasers have notice of the facts involved in the first three points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point. It is also observable that the equity arising out of the establishment of the four

points I have mentioned has been sometimes explained by the implication of mutual contracts between the various purchasers, and sometimes by the implication of a contract between each purchaser and the common vendor that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchaser is in equity an assignee of the benefit of those covenants. In my judgment the implication of mutual contract is not always a perfectly satisfactory explanation. It may be satisfactory where all the lots are sold by auction at the same time, but where there is no sale by auction, but all the various sales are by private treaty, and at various intervals of time, circumstances may at the date of one or more of the sales be such as to preclude the possibility of any actual contract. For example, a prior purchaser may be dead, or incapable of contracting at the time of the subsequent purchase, and in any event it is unlikely that the prior and subsequent purchasers are ever brought into personal relationship, and yet the equity may exist between them. It is, I think, enough to say, that where the four points I have mentioned are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase."

A purchaser of land from the original owner cannot enforce a restriction imposed by the latter upon a lot subsequently conveyed, where there was nothing in his deed giving him any right or interest in the remaining property, or other indications that the lot was sold as a part of a uniform scheme. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583 (1899).

§ 310. Same subject.

A difference in principle can be discerned between the case of a grantee holding premises under a subsequent conveyance from the common source of title and seeking to enforce a covenant restricting the use of nearby premises, contained in a deed of prior date, from the case of a man who, holding title under a prior grant, seeks to enforce a covenant contained in a deed later than the one under which he claims. The junior grant is supposed to have been made for a consideration

enhanced by the circumstance that the use in obnoxious ways of property adjacent to or in the neighborhood of that conveyed had been restrained in previous conveyances. And, as no injustice to the former purchaser will be occasioned by holding him to the observance of the restriction in his deed, it is reasonable to allow any property owner who bought later from the same vendor, who will be damaged by a breach of the restriction, to restrain a breach. But the same reasoning does not obtain as widely in favor of permitting a senior grantee of one lot to insist on a restrictive covenant inserted in a later conveyance of another lot, inasmuch as the covenant to be enforced was not in existence when the senior grantee bought, and the presumption that he bought in reliance on its protection does not arise naturally. In such an instance it must appear in some manner from the deed to the senior grantee, or *dehors* said deed, that the vendor intended the covenants to bind himself and those who thereafter should derive title from him to property in proximity to complainant's. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547 (1909).

§ 311. — illustrative cases.

An agreement was made subsequent to the conveyance of a lot of land which provided that the vendee would erect a residence on the lot within a year, and would place the main front wall thereof twelve feet from the street line, and that the vendors, in case of any further conveyance of lots on that street, would stipulate with the purchasers that the houses erected on such lots should be so erected that the main front wall should be on a line twelve feet from the line of the street. Held, that the vendee with whom the agreement was made was entitled to the benefit of a covenant contained in the deed to a subsequent grantee, binding her, so far as her land was concerned, to observance of the terms of the agreement, although there was no privity between them. *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206 (1873).

The owner of a parcel of land in a city conveyed portions thereof to various persons subject to certain restrictions, and subsequently conveyed the remainder of the tract subject to

similar restrictions. It was held that the covenants in the last deed were for the benefit of the prior vendees. *Equitable Life Assurance Society v. Brennan*, 24 N. Y. Supp. 784, 30 Abb. N. C. 260 (1893).

A covenant entered into by adjoining lot owners, for themselves and all claiming under them, to the effect that all buildings erected on such lots should be a specified distance from the front street line, is binding on, and enforceable against, all the parties to the agreement and subsequent purchasers of such lots. *Roberts v. Levy*, 3 Abb. Pr. (N. S.) (N. Y.) 311 (1867). "With such an easement and charge fastened on the two lots, to which the plaintiff has acquired title, through one of the signers of the agreement, it is quite clear that he could be restrained by the owners of the adjoining lots from building up to the street line. Plaintiff is as much bound to leave this space open in front of these two lots, in pursuance of the agreement between the original owners, as though he was actually a party to it."

The owner of a tract of land conveyed a plot thereof for a term of years by lease which contained a covenant on the part of the lessee, and his assigns, against the doing of anything on the premises which should be an annoyance to the neighborhood, or to the lessor or his tenants, or diminish the value of the adjoining property, or build on the land any building or erection without first submitting the plans to the lessor, and obtaining his approval. Thereafter the owner demised an adjoining plot for a term of years which contained a similar restrictive covenant. A company purchased the first lease, and proposed, with the approval of the lessor, to erect a building which would interfere with the access of light to the house on the plot of land comprised in the second lease. The owner of the second lease filed suit to restrain the company from erecting the house. Held, that the covenants in the first lease did not inure to the benefit of the lessee of the second plot, and that he could not maintain such suit. *Master v. Hansard*, L. R. 4 Ch. Div. 718, 46 L. J. Ch. 505, 36 L. T. Rep. 535, 25 Wkly. Rep. 570 (1876).

In this respect the court said: "Now, when the plaintiff's predecessor in title took his lease, he had no knowledge of the

nature of the title to the adjoining property; all he knew was that the piece of land adjoining his had once been part of the same estate; he knew nothing of the covenant; there is no reference to it in his lease, and it would be strange to say that a lessor who has taken a covenant for his own benefit can be prevented from dealing with it for his own benefit because he has granted parcels of the land to other people. The covenant is not mentioned in the plaintiff's lease, and it cannot have been the intention of the parties thus to restrict the use of a covenant which was entered into, not for the benefit of the adjoining land, but for the benefit of the owner of the estate, that he might be able to make the most of it. It would be too great an extension of the doctrine of implied obligation to raise by implication a right in the nature of an equitable assignment of the benefit of the covenant. There was no bargain as to enforcing the covenant for the benefit of the plaintiff, and we cannot imply one."

An estate was platted into lots, and a large portion thereof sold. Subsequently some of the unsold part was put up for sale at auction subject to a condition that the purchaser of certain of the lots was to covenant to expend on each of the dwelling houses built not less than twelve hundred pounds. As to some of the lots there were other restrictions, and some lots were sold free from restriction. One of the plaintiffs bought some of the free lots, and also a restricted lot, but not one of the first named restricted lots. The following year the remaining unsold lots, with another piece of land forming together the whole of the remaining portion of the estate, were put up for sale, with similar conditions as to the first named lots; but as to other lots free from restrictions. All except the first named lots were sold, both plaintiffs purchasing some of the free lots. The following year the first named lots were sold to the defendant, who entered into a covenant with the vendors not to build houses of less value than twelve hundred pounds. Thereafter he proposed to build houses of less than that value. Held, that the plaintiffs were entitled to restrain the defendant from such violation of his covenant. *Collins v. Castle*, L. R. 36 Ch. Div. 243 (1887).

Where the owner of land conveyed a portion thereof and

in the deed both he and the grantee covenanted prohibiting building on both the part conveyed and the part retained by the grantor except in a specified manner, with stipulations for payment of liquidated damages in case of a breach of the covenant, it was held that a subsequent purchaser from the grantor of part of the land so retained by him was bound by the restriction, although no mention was made of it in his deed. *Coles v. Sims*, 5 De G. M. & G. 1 (1854).

§ 312. — how intention is determined.

The essential questions in cases of this kind are whether the common grantor meant the restrictive covenant to inure only to his own benefit, or to the benefit of all persons to whom he had already conveyed or thereafter should convey property in the vicinity; and, if the latter was his purpose, whether it had been manifested in a way that purchasers would be treated as having bought with notice of it. The primary inquiry is as to the intention of the common grantor in imposing the restriction; but a bare intention to make the covenant inure to the benefit of all persons claiming under him by either prior or subsequent deeds, cherished, but not made known so as to affect purchasers with notice, would not impair the right of purchasers to hold their tracts exempt from the restriction. Competent and sufficient proof must be furnished of the intention and that the defendant bought with actual or constructive notice of it. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547 (1909).

The circumstance that the original proprietor of various parcels of land imposed a restriction in the deed to the last parcel sold by him is very cogent to prove he did so for the benefit of previous vendees, as he had no personal interest in the covenant. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547 (1909).

It seems clear that the subsequent conduct of the grantor in inserting a similar covenant in a subsequent conveyance of a part of the tract cannot be properly regarded as a circumstance in aid of the intention or purpose of the parties to the prior deed to create a general plan. Nor does the circumstance that the grantor retained a lot adjacent to and similar

to the lot conveyed justify the conclusion that the covenant was mutually intended by the parties for the benefit of and to be enforceable by a subsequent owner of the lot so retained. The prior purchaser may well have refused to enter into a covenant broader than that contained in his deed, and the grantor may well have had no purpose to exact a covenant other than one purely personal to himself. The mutual purpose that the covenant should purport no more than it expressed, and should be purely personal, and should not inure for the benefit of or be enforceable by a subsequent purchaser of the remaining adjacent lot, may well have entered into the consideration price of the purchase. *Sailer v. Podolski*, ... N. J. Eq. ..., 88 Atl. 967 (1913).

The courts are not in accord as to the rights of one holding land under a subsequent conveyance from a common grantor to enforce a restrictive covenant in an earlier conveyance, when there is no proof the covenant was intended for the benefit of the later grantee, except that it was contained in the prior deed. In some cases it has been regarded as not appurtenant to the land retained by the grantor, but as personal to him, and the right of a subsequent vendee to enforce it has been denied. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547 (1909).

Where a restrictive covenant of a prior purchaser expressly provides that it is intended for the benefit of subsequent purchasers of the remaining land of the common grantor, or so declares by providing that it may be enforced by such subsequent purchasers, it may be enforced by subsequent purchasers against such prior purchasers. *Sailer v. Podolski*, ... N. J. Eq. ..., 88 Atl. 967 (1913).

§ 313. Grantees from common grantor taking with mutual obligations.

Grantees from a common grantor whose deeds contain restrictive covenants have been allowed to enforce them *inter sese*. This has been true in cases where, although the covenant or agreement in the deed regarded as a contract merely, is binding only on the original parties, yet, in order to carry out the plain intent of the parties, it will be construed as creating

a right or interest in the nature of an incorporeal hereditament or an easement appurtenant to the remaining land belonging to the grantor at the time of the grant, and the right and burden thus created will respectively pass to, and be binding on, all subsequent grantees of the respective lots of land. This right of such grantees, however, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property, and its consequent benefit, and the covenant has been entered into as a part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the parties have bought with reference to such general plan or scheme, and the restrictive covenant has entered into the consideration of their purchases. *Summers v. Beeler*, 90 Md. 474, 45 Atl. 19, 48 L. R. A. 54, 78 Am. St. Rep. 446 (1899); *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543 (1892).

In an action to enjoin the violation of a restrictive covenant, a stipulation filed by the parties to the action that plaintiffs and defendants derived their titles from a common source and were mutually subject to the restriction contained in the covenant, is sufficient to establish the right of the plaintiffs to sue without inquiring how the right was derived. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

Where the owner of land conveys a portion thereof and in the deed of conveyance there is a covenant binding both him and the grantee not to erect any building on the premises conveyed nor on the land retained by the grantor within ten feet of the street line. It was held that this covenant was binding upon subsequent grantees of the common grantor, and that the first grantee or any other grantee from such common grantor could enforce observance thereof by any other of such grantees. *Francis v. Ziering*, 128 N. Y. App. Div. 253, 112 N. Y. Supp. 647 (1908).

A grantor conveyed a lot to one Ritter without restriction. Thereafter Ritter conveyed the lot back to the grantor, who in turn reconveyed to Ritter by deed imposing a restriction on its use. During the time that Ritter owned the lot unburdened by restriction, the grantor conveyed another lot in the same tract to one Dunham without restriction. Held,

that Dunham could not enforce the observance by Ritter of the restriction imposed on his lot, as no equitable agreement existed between the two. Although there be a common grantor, to establish an agreement of this kind, it must be shown that there was mutuality of obligation and benefit. *Davidson v. Dunham*, 159 N. Y. App. Div. 207, 144 N. Y. Supp. 489 (1913).

Where one purchases a number of lots in a tract of land only one of which is subject to restrictions, he cannot claim that a mutual agreement existed between him and the other owners of lots in the same tract deriving their titles from the same common source so that the latter were burdened with similar obligations. *Davidson v. Dunham*, 159 N. Y. App. Div. 207, 144 N. Y. Supp. 489 (1913). In this respect the court said: "The foundation of this action is a mutual equitable agreement between the several lot owners, the consideration for which is the benefit to all arising from the restriction upon each. It could scarcely be contended that Crocker could assert the existence of such an agreement at a time when, in derogation of it, he was holding four of these very lots untrammelled by the agreement which is asserted as the basis of this right of action. His right to enforce the restriction against defendants by necessary implication would carry with it defendants' right to assert the same against his title. Such right they did not and could not have, inasmuch as his deed to such four lots contained no such restriction. He, having taken title to a portion of this tract in a manner which precludes the enforcement of such an agreement against him, could not be heard in a court of equity to ask for the enforcement of that agreement which he himself was violating in so holding such title."

§ 314. Where restrictions are contained in deed to common grantor only.

Where land is conveyed under restrictions and is subsequently subdivided, sold and conveyed by deeds containing no mention of the restrictions, and no restrictions in themselves, an individual purchaser cannot claim the benefit of the restrictions in the original deed as against another of

such purchasers. *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506, 14 Ky. L. Rep. 502 (1892).

A deed to land provided that buildings erected thereon "shall be of brick, and set the same distance back from Third street as the house now erected on the southwest corner of Third and Oak streets, and shall be suitable dwellings for the neighborhood." Held, that the restriction was for the benefit of the corner lot, and not for the benefit of lots into which the property was subsequently divided; the deeds to the purchasers of the latter property containing no mention of the restrictions. *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506, 14 Ky. L. Rep. 502 (1892).

In this case the court said: "There might be covenants in deeds executed by a common grantor to different purchasers made mutually, and reciprocally binding upon each, but no such condition exists in this case. The essential relation of estates dominant and servient does not exist between the lots owned by appellee and appellant, and consequently there is not an easement on either for use of the other.

"The only case cited by counsel that authorizes this action by appellee is *Winfield v. Henning*, 21 N. J. Eq. 188 (1870), and even in that case it was conceded an action at law would lie, and upon supposed equitable grounds alone the owner of one lot was held for the benefit of another owner to observance of a covenant to the common grantor. But the judgment of the chancellor in that case was, in *Dana v. Wentworth*, 111 Mass. 291 (1873), held to be inconsistent with the decisions of courts of Massachusetts and of England; and we may add, that judgment cannot be supported by principle, because it restricts one lot owner in the use of his property for the benefit of another with whom he never contracted, and to whom he never became bound, expressly or by implication."

It has been held, however, that the grantees of lots from a common grantor are charged with knowledge of, and are bound by, restrictive covenants contained in the recorded deed of such land to their grantor. *Müller v. Klein*, ... Mo. App. ..., 160 S. W. 562 (1913).

§ 315. Where lots are conveyed under a general plan or scheme of improvement.

Where a single tract of land is divided into parcels, and the parcels are conveyed by deed containing similar restrictive covenants pursuant to a uniform plan adopted for the benefit of all, mutual negative easements are created, each parcel becoming both a servient and dominant tenement, and privity of estate or contract is unnecessary to enable the owner of one parcel to maintain an action to restrain the violation of his rights. *Landsberg v. Rosenwasser*, 124 N. Y. App. Div. 559, 108 N. Y. Supp. 929 (1908); *Davidson v. Dunham*, 159 N. Y. App. Div. 207, 144 N. Y. Supp. 489 (1913); *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730 (1911); *Hills v. Metzenroth*, 175 Mass. 423, 53 N. E. 890 (1899); *Tobey v. Moore*, 130 Mass. 448 (1881); *Yeomans v. Herrick*, ... Mo. App. ..., 165 S. W. 1112 (1914); *Beals v. Case*, 138 Mass. 138 (1884); *Sharp v. Ropes*, 110 Mass. 381 (1872); *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 388 (1892); *Brouwer v. Jones*, 23 Barb. (N. Y.) 153 (1856); *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701 (1907); *Henderson v. Champion*, ... N. J. Eq. ..., 91 Atl. 332 (1914).

And this right of the grantees under a general plan is not affected by the following subjoined limitation, which was contained in all their deeds: "The description by metes and bounds herein set forth shall be conclusive upon the parties, their heirs, successors and assigns, and shall never be construed so as to enlarge said description or embrace land or rights in land not within said metes and bounds." *Henderson v. Champion*, ... N. J. Eq. ..., 91 Atl. 332 (1914).

Restrictions imposed upon property in pursuance of a general plan for the benefit of the several lots, give purchasers a right in the nature of an easement, which will be enforced in equity, upon equitable principles, against a grantee of one of the lots. *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84 (1910).

Where the owner of a tract of land subdivides the same and establishes a plan to create a desirable residential district, and to that end adopts certain building restrictions,

such restrictions will be enforced against a purchaser with notice in favor of a purchaser who was induced to acquire his property by reason of such restrictions. *Chapin v. Dougherty*, 165 Ill. App. 426 (1911).

The owner of a city block may divide it into lots and impose restrictions thereon in conformity with a plan of improvement adapted for dwelling houses, although the property on the opposite sides of the streets is not subject to such restrictions, provided the restrictions are in conformity with a general uniform plan of improvement extending over the entire tract. *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911).

This rule proceeds upon the theory that there is mutuality of covenant and consideration. *Davidson v. Dunham*, 159 N. Y. App. Div. 207, 144 N. Y. Supp. 489 (1913).

Where a series of conveyances are made subject to a restrictive agreement, the successive owners hold the lands charged with the restriction and are estopped to deny its validity. *Goodhue v. Cameron*, 142 N. Y. App. Div. 470, 127 N. Y. Supp. 120 (1911).

Where the owner of a park conveyed lots therein subject to restrictive covenants, the covenants in all the deeds being uniform, the grantee of one of the lots could enforce such covenants against the owners of other lots in the park. *Beckwith v. Pirung*, 134 N. Y. App. Div. 608, 119 N. Y. Supp. 444 (1909).

Where a restriction is imposed for the benefit of an entire tract of land, each purchaser of a parcel thereof takes it with the right to enforce the restriction against other grantees of parcels of the same tract with notice. *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701 (1907).

This is true irrespective of the order of the conveyances and of whether the restrictive covenant is expressed in the deed. *Silberman v. Uhrlaub*, 116 N. Y. App. Div. 869, 102 N. Y. Supp. 299 (1907). The same may be enforced by one purchaser against another without proof of special damage. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

In the English case of *Harrison v. Good*, L. R. 11 Eq. 338, 24 L. T. Rep. 263, 40 L. J. Ch. 294, 19 Wkly. Rep. 346 (1871),

it was held that where land is sold in lots, and each purchaser enters into a restrictive covenant with the vendor which is required by the conditions of sale, a person claiming under one purchaser can enforce the covenant against a person who claims under another purchaser with notice of the covenant.

The reason for this rule has been stated to be that where all the parcels of a tract are conveyed subject to a uniform plan of restriction intended to benefit the entire tract, and of a character likely to induce purchases, it would be inequitable not to imply mutual reciprocal rights, hence the doctrine of equitable negative easements. *Landsberg v. Rosenwasser*, 124 N. Y. App. Div. 559, 108 N. Y. Supp. 929 (1908).

When an owner of a tract of land lays it out into streets and lots and adopts a restrictive covenant relative to establishing a building line, with a view to secure the defined conditions named in the covenant for the benefit of the entire tract which he seeks to develop, and inserts the covenant in all deeds as a part of the defined scheme and as an exaction from all purchasers for the benefit of each purchaser, the equitable right to the enforcement of the covenant inures to each purchaser, irrespective of the time of his purchase. Under such conditions the benefit to be derived from the covenant as a part of the general scheme necessarily enters into the consideration of each purchase, although the covenant may, in terms, only bind each purchaser and his heirs and assigns. *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899 (1907).

"The complainant, not being a party to the defendant's deed, and having therefore no privity, either of legal estate or contract, with the defendant, her right to enforce the covenant is equitable only, and depends upon the existence of a general plan for the improvement of this avenue by a uniform scheme, and the insertion of covenants in the deeds of purchasers, which were intended for the benefit of each purchaser on the avenue, and to which each purchaser with notice was subject." *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

Where a grantor covenants with a purchaser of one of several lots in a tract binding him to incorporate certain building restrictions in the deeds to the other lots in the

tract, such covenant inures to the benefit of the subsequent purchasers of such other lots, and they may enforce it against one of the grantees who violates it. *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391 (1893).

Where, however, there is no general plan or scheme of improvement, a grantee of a lot is not entitled to enforce the owner of an adjoining lot to observe restrictions imposed upon its use merely by reason of the fact that similar restrictions were imposed on his lot, or that the grantor had conveyed a number of lots with similar restrictions thereon. *Haines v. Einwachter*, ... N. J. Eq. ..., 55 Atl. 38 (1903); *Clark v. McGee*, 158 Ill. 518, 42 N. E. 965 (1896).

The grantee of a lot taking the same with a restriction relating to the building line, cannot enforce the observance of a similar restriction on a lot subsequently conveyed by the same grantor, when the grantor did not impose any servitude upon the land he retained, and there was no general plan or scheme of improvement for the benefit of all purchasers. *Summers v. Beeler*, 90 Md. 474, 45 Atl. 19, 48 L. R. A. 54, 78 Am. St. Rep. 446 (1899).

The owner of land bordering on a street conveyed it with a provision that the grantee, or his heirs or assigns, should not build within eight feet of the street. His grantee resold the land in lots to different purchasers. The owner of one lot built on it nearer than a distance of eight feet from the street, and the original grantor filed a bill in equity for the benefit of several owners of lots to restrain the violation of the restriction. Held, that he could not maintain the bill in the absence of evidence that the restriction was imposed as part of a general plan for the benefit of the land granted and of other land on the street. *Dana v. Wentworth*, 111 Mass. 291 (1873), see also, *Jeffries v. Jeffries*, 117 Mass. 184 (1875). The court said: "The plaintiff does not show that since that conveyance she is the owner of any land which may be affected by a disregard of the restriction. She is not therefore entitled to ask a court of equity to enforce the restriction for her own benefit. Nor can the bill be maintained, even by treating it, as it was treated by both parties at the argument, as brought against the defendant for the benefit of

the other parties, who like himself derived their titles from Nudd. There is nothing in the case to show that the restriction in the deed from the plaintiff to Nudd was a part of a general plan for the benefit of the land thereby granted and other estates on the same street, or was inserted in the plaintiff's deed for the benefit of the grantee or his assigns, or was repeated in any grant or covenant executed by him or them or either of them. Under these circumstances, a purchaser from Nudd of part of the land so granted to him has no more right in equity than at law to enforce the restriction against the purchaser of another part of the same land."

§ 316. — cases holding general plan to have been adopted.

Where the owner of a tract of land conveys one of the lots therein and restricts its use to residence purposes, and establishes a building line thereon, and which restriction is expressly made to operate as a covenant running with the land for the benefit of other lots in the tract or their owners, such covenant may be enforced by the owner of any lot in the tract for the benefit of which the restriction was imposed. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157 (1912).

The plat of an addition to a town showed a dotted line across the north end of the lots, twenty feet back from the north line, which was marked "line of front of buildings." The lots were conveyed by their numbers on the plat. Following the granting clause were the words, "together with the exclusive use of the court-yard between said lots and the street," which was a reference to the twenty foot strip, "upon condition that such yard shall only be used as a front-door yard, and that said party of the second part shall put no building upon said yard except front-door steps, nor erect any fence of unusual height, which shall obstruct the view of the neighborhood." Held, that the restrictions in the use of the twenty foot strip was intended for the benefit of the other lots fronting on the same street, and to the extent of such restrictions it created an implied servitude on each lot in favor of the other lots. *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. 687 (1889).

The owner of a number of lots fronting on an avenue, conveyed one of them by deed containing the following covenant: "It is understood and agreed, as a part of the consideration above expressed, that the purchaser is to erect on the premises described herein a single dwelling, costing not less than seventy-five hundred dollars, said dwelling to be commenced within a period of forty-five days from this date. It is further agreed that the seller will sell the remaining lots to parties who will cause to be erected single dwellings only on each lot of fifty feet." This provision was held to inure to the benefit of the subsequent purchasers of the remaining lots from the grantor, who were entitled to maintain an action to enjoin the violation thereof. *Hutchinson v. Ulrich*, 145 Ill: 336, 34 N. E. 556, 21 L. R. A. 391 (1893).

The owner of a large tract of land adjoining Baltimore city leased the same to a corporation for a period of ninety-nine years, but reserved to himself a lot with a frontage of four hundred feet. At the time of the execution of the lease an agreement was made under seal between the lessor and the corporation that the following by-laws or covenants should be as fully complied with as if embodied in the lease: "(1) No land to be sold or leased without a pledge to build speedily, design of buildings to be approved by the directors. (2) Buildings to be twenty feet back of building line, and front to be ornamented with shrubbery and flowers. (3) No nuisances, factories, etc., to be permitted; clause in deed to this effect. (4) To regulate other proceedings." The company conveyed a number of parcels of the land, in some of which conveyances restrictions were imposed on the use of the land, while in others the deeds were made subject to the by-laws of the company. After the lessor's death, the purchaser of the four hundred foot lot reserved by him, released the company from the restrictive by-laws, and the company also acquired the reversion in all of the land, thereby becoming the owner of the fee. It was held that in view of the language of such covenant and the interest retained by the lessor, some of the covenants were intended not merely for the benefit of the lessor, but for the common advantage of all parties who became grantees of the property. Such was

the covenant requiring the designs of proposed buildings to be approved by the directors. *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 286, 1077, 36 L. R. A. 393 (1895).

Where the owner of a tract of land subdivided the same and improved and sold lots therein according to a general scheme for the development of the tract as a residential district, and in all of the deeds to lots inserted restrictions of a similar although of not a precisely identical character, but which were for the benefit of all of the lots in the tract, it was held that a number of grantees of such lots might join as complainants in a suit in equity to enjoin the owner of one of the lots from violating the restrictions. *Allen v. Barrett*, 213 Mass. 36, 99 N. E. 575 (1912).

Evidence that the owner of a tract of land abutting on a city street divided it into lots, which were conveyed to numerous grantees subject to a uniform restriction that no buildings except dwelling houses at least two and one-half stories in height set back six feet from the street should be erected thereon, was held to warrant a finding that such grantor contemplated a scheme of general improvement, and intended to restrict the use of the land to residential purposes for the benefit of all the grantees. *Hills v. Metzenroth*, 173 Mass. 423, 53 N. E. 890 (1899).

The owner of a tract of land subdivided it and conveyed each lot subject to the restrictions that "the grantee shall within one year from the date hereof cause to be erected on the premises granted a dwelling house to be exclusively used as a residence for a private family; and no other buildings except the necessary out-buildings requisite and to be used exclusively for domestic purposes shall ever be erected thereon." Held, that the restrictions were placed on the lots for the benefit of the purchasers, and that they could be enforced in equity by and against such purchasers and their grantees. *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122 (1894).

The owner of a triangular tract of land, bounded on one side by an avenue and on another by a railroad, opened a street through it from the avenue, and sold two lots, one on either corner of the avenue and street, without restriction.

Two years later he divided his remaining land into lots according to a plan, and on conveying the lots subjected them to the restriction that only first class dwelling houses should be built thereon, except that, in case of the lot at the junction of the avenue and railroad and the lot next to it on the avenue, the restriction was modified so as to permit the erection of a store on the lot on the railroad, and except that a rear lot on the railroad was sold without restriction. Held, that any of the subsequent grantees could enforce the restriction confining buildings to first class dwelling houses erected on any of the lots except on the lot on the avenue and railroad, and could insist that no building should be erected upon that lot except a store or a first class dwelling house. *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628 (1892).

Where lots in a residential addition to a city were conveyed by deeds containing covenants fixing a building line and prohibiting the sale of intoxicating liquors thereon, such covenants inured to the benefit of all purchasers. *Fete v. Foerstel*, 159 Mo. App. 75, 139 S. W. 820 (1911).

A number of owners of land abutting on the Atlantic ocean in Atlantic City, conveyed to the city a strip of their land sixty feet wide between high and low water marks for the purpose of a public street and a board walk, the grantors covenanting not to erect or allow to be erected on their lands on the ocean side of such strip any building or structure except as provided by ordinance. Held, that a general scheme of improvement was thus created and that any one of the grantors could maintain an action to prevent the violation of such restrictions on any of the land so restricted. *White v. Young's Pier & Hotel Co.*, ... N. J. Eq. ..., 75 Atl. 351 (1911), affirmed in 79 N. J. Eq. 597, 82 Atl. 912.

The owners of a tract of land conveyed lots therein by deeds containing restrictive covenants against the erection of buildings within twenty feet of the street line, and the covenants expressly provided that they were for the benefit of the grantors and all persons who purchased or derived title through them to any part of the tract laid down on a certain plat, and it further provided that such covenants shall inure to the benefit of the grantors and "of their grantees who may

at any time own any of the land laid down on said plat and may be enforced by any of them." It was held that such covenants were for the benefit of the various grantees and might be enforced by any of the owners of the land shown on the map. And this finding was not affected by the fact that a corner lot conveyed by the original grantors was deeded under restrictions allowing the erection of buildings within ten feet of the street line. *Coates v. Cullingford*, 147 N. Y. App. Div. 39, 131 N. Y. Supp. 700 (1911). Here it appeared that the restrictive covenants were entered into with a design of carrying out a general scheme for the improvement and development of the real property of the original grantors. There was mutuality of covenant and consideration which bound each of the grantees one to another and gave to each a remedy for any violation of the covenant by another.

The owners of a tract of land, just prior to subdividing it, agreed to restrict its use to residence purposes. They then adopted a general plan of improvement, and entered into mutual and reciprocal covenants regarding its use. Held, that such covenants were for the benefit of a subsequent purchaser of lots who had a right to rely upon their observance by purchasers of other lots, regardless of whether the restrictions were mentioned in his deed, and of whether the other purchasers took from the same immediate grantor. *Silberman v. Uhrlaub*, 116 N. Y. App. Div. 869, 102 N. Y. Supp. 299 (1907).

Where the owner of a block of land conveyed the lots therein subject to a uniform restriction against the carrying on of business offensive to the neighbors, such restriction was intended to secure each purchaser against offensive use of other lots in the same block, and a purchaser of one of the lots may enjoin the purchaser of any other lot in the block from carrying on any such offensive business on his property. *Barrow v. Richard*, 8 Paige Ch. (N. Y.) 351, 35 Am. Dec. 713 (1840).

An owner of a block of ground divided it into lots and sold them to different purchasers, with a restrictive covenant on the part of the grantees in each deed against certain use

being made of the lots. Held, that a purchaser acquired the right to enforce the restriction against other lot owners. *Raynor v. Lyon*, 46 Hun (N. Y.) 227 (1887).

The tenants in common of a parcel of land laid out into building lots, conveyed to the city in which it was located a strip running through the center of the parcel for a highway, and called it Halsey street, and in the deed of conveyance provided: "And it is hereby expressly understood, covenanted and agreed, by the said grantors, for themselves and their heirs and assigns, respectively, forever, that no building of any description shall, at any time forever hereafter, be erected, placed or put within eight feet of said Halsey street, or of either side thereof." It was held that such provision was a mutual covenant between such tenants in common, and constituted a grant in fee to each of a negative easement in the lands of all restricting the right to build in the specified limits, which would be enforced between them, their heirs and assigns, at law and in equity. *Greene v. Creighton*, 7 R. I. 1 (1861).

The owner of a tract of thirteen lots conveyed them to different purchasers, each lot subject to a covenant restricting the use of the land as a brickyard, and in some other respects. Defendant subsequently purchased lot eleven, but the deed of conveyance to him did not contain any restrictive covenants. A brick company contracted with defendant to purchase his lot under conditions of sale which stated that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not; and provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation. The existence of the restrictions on the lot was not mentioned in the contract, but during the negotiations the defendant stated that there were covenants restricting the use of the land as a brickyard, but his solicitor, who was present, and to whom the plaintiffs' solicitor applied for information, stated that he was not aware of any such covenants. It was held that if the contract of sale were carried out the plaintiffs would be bound by the restrictive covenant, and that the owners of the other twelve lots purchased from the original vendor would

be entitled to enforce the covenants against the plaintiffs. *Nottingham Patent Brick & Tile Co. v. Butler*, 16 Q. B. Div. 778, 54 L. T. Rep. 444 (1886).

The owner of an estate conveyed a portion thereof to D., who covenanted for himself, his executors, administrators and assigns, with the vendor, his heirs and assigns, relative to certain restrictions imposed on the use thereof. About the same time the vendor conveyed two other portions of the estate to other purchasers, subject to similar restrictions. Subsequently the owner sold the remainder of his estate in lots at auction, subject to restrictive covenants similar to those contained in D.'s deed, and binding on each purchaser. The auction sale plan showed the whole estate sold and unsold. In an action brought by the assigns of purchasers at the auction sale to enforce against a lessee of an assign of D. the observance of the restrictive covenants contained in D.'s deed, it was held that there was a general building scheme affecting the whole estate; that the plan and particulars of the auction sale raised an irresistible inference that the vendor intended that the purchasers at that sale have the benefit of D.'s covenants so that the purchasers at that sale could enforce D.'s covenants as assigns of the vendor, and this, although the benefit of such covenants had never been expressly assigned to the purchasers at the auction sale. *Nalder & Collyer's Brewery Co. v. Harman*, 83 L. T. Rep. 257 (1900).

§ 317. — cases holding general plan not to have been adopted.

The owner of a tract of land conveyed a portion thereof to one Gelston, who covenanted for himself and all persons claiming under him that, "these presents are upon the express condition that no buildings shall be erected upon the premises for the purpose of prosecuting any business, trade, calling or manufacture prohibited by the existing laws of the state of Maryland or the ordinances of the city of Baltimore, or which shall cause or produce a nuisance injurious or prejudicial to any of the adjacent lots, or calculated to prevent the beneficial use and occupation of the same, and that no such excepted business, trade, calling or manufacture shall

be prosecuted or carried on within the premises unless the consent of the Canton Company shall first be had and obtained therefor, under penalty of rendering this indenture and all parts thereof void." Subsequently the grantor (the Canton Company) conveyed other lots in the vicinity without restriction. Gelston thereafter subdivided his tract and conveyed portions thereof to different persons, to whom the Canton Company executed a deed of release or quit-claim of its title or right to enforce in any manner the above mentioned restriction. Held, that there was no evidence that the restriction in question was made in pursuance of a general plan for the improvement of the real estate, and that grantees of other lots from the Canton Company could not enforce the restriction. *Safe Deposit & Trust Co. v. Flaherty*, 91 Md. 489, 46 Atl. 1009 (1900).

Where no restrictions were shown on a recorded plat of the territory in question, and most of the lots were sold subject to the same restriction as to building line, but some of the lots were sold without restriction, and some of the owners of the restricted lots had violated the restriction, which violations had not been resisted by other purchasers, it was held that no general plan or scheme for the benefit of all the purchasers of lots sold was shown. *Summers v. Beeler*, 90 Md. 474, 45 Atl. 19, 48 L. R. A. 54, 78 Am. St. Rep. 446 (1899).

The owner of a small tract of land divided it into six lots, three of which were conveyed subject to a restriction that all buildings erected thereon should be set back from the street on a line with buildings already erected thereon, two of the remaining lots were conveyed subject to different restrictions, namely, "that all buildings that shall be erected on the premises shall be set back from Worcester street at least ten feet, excepting, however, that in case circular front buildings shall be placed thereon, this restriction shall not prevent the building of the circular part of said front in front of said line of ten feet; provided, however, that the projection or swell made by said circle shall not be more than two feet six inches from the line last mentioned," and the remaining lot was conveyed subject to no restrictions. Held, that these facts did

not show the existence of a general scheme. *Webber v. Land-rigan*, 215 Mass. 221, 102 N. E. 460 (1913).

In this regard the court said: "No doubt it was expected that the restrictions would benefit the premises which were subjected to them, and a common advantage to all of the lots may thus have been anticipated. But that is far from establishing a general scheme or plan. The difference in the restrictions cannot be regarded, we think, as unimportant, nor the conveyance of the sixth lot as an insignificant circumstance. In addition to the difference in the restrictions in the two groups of original conveyances in which restrictions were inserted and the conveyance of the sixth lot without restrictions, it is to be noted that there was no plan by Hunnewell showing the lots were subject to restrictions, and there is no language in the deeds under which the petitioners and respondents respectively claim from which any intent can be gathered to annex the benefit of the restrictions to which the petitioners' lot is subject to the premises belonging to the respondent."

Although an owner of a tract of land made conveyances of portions of the tract subject to restrictions, where he also conveyed large portions of it without any restrictions, and such latter conveyances included two corner lots, and the size and position of the lots conveyed without restrictions were such that they could not be regarded as unimportant and insignificant, no general building scheme for the entire tract had been shown. Especially is this true where there is a difference in the restrictions imposed. *Donahoe v. Turner*, 204 Mass. 274, 90 N. E. 549 (1910).

The owner of a tract of land laid it out into lots and recorded a plat showing the streets and lots and their dimensions. On one side of one of the streets there were five lots numbered from six to ten, and on the opposite side a large lot. The owner conveyed the large lot without restriction, and built on lot ten a house standing back twenty feet from the street. He then conveyed lot eight and part of seven to plaintiff's grantor, and provided in the deed that for fifteen years no building should be placed nearer than twenty feet of the street, and no trade offensive to dwelling houses in

that neighborhood should be carried on on the premises; that a violation of either of the restrictions should not work a forfeiture, but that the grantor, his heirs or devisees, might enter upon the land and remove that which constituted a violation of the restrictions. He afterwards conveyed the rest of lot seven and lot six to the defendant with the same restrictions. Held, that the plaintiff, owner of lot eight and part of seven, had no right to maintain a bill in equity to restrain defendant, owner of lot six and part of seven, from violating the restrictions on his land. *Sharp v. Ropes*, 110 Mass. 381 (1872).

It was not claimed in this case that there was any written covenant by the grantor, nor any express stipulation or direct assurance by him, that any person who should purchase a lot on the side of the street in question should have the benefit of a restriction binding all the other purchasers to leave the twenty foot space between their buildings and the street. "The only ground," said the court, "upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building, by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact, that in his transactions with two separate and independent purchasers, the grantor conveyed a portion of the land in each case, subject to the terms and conditions set forth in the bill of complaint. It is true that, of these conditions, the one prohibiting the prosecution of any offensive trade or manufacture upon the premises, or the using of them for the keeping of swine, or of a livery stable, would in practice be beneficial to the neighborhood generally. But it is to be remembered that the grantor had himself built a dwelling house in that immediate neighborhood, and the provision which he made for the prevention of nuisances may have been intended for the benefit of that particular house.

. . . There is nothing from which the court can infer that the restriction contained in the deed to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan,

or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs or devisees may enforce it. Neither of the deeds, under which these parties respectively claim, purports to give, to the grantee any such right against any other grantee. For aught that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling house. The burden of proof is on the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained."

The owner of land lying on both sides of a street granted that lying on one side, which bordered on the ocean, subject to the condition that it should be used only for bathing and boating from the beach, and that only low bathing houses should be built thereon. It did not appear that he then intended that the land so granted should be subsequently divided and held by different owners. This, however, was done, and the deeds of conveyance were made subject to the condition. The purchaser of one end of the land also purchased from a stranger a lot opposite thereto, on the other side of the street. Held, that such purchaser could not restrain the purchaser of another portion of the land from violating the condition. *Jewell v. Lee*, 96 Mass. (14 Allen) 145 (1867).

The court, through Chief Justice Bigelow, said: "The main ground on which the plaintiff rests his claim to equitable relief is, that the condition annexed by the original owner and grantor to his grant of the entire tract of land, of which the plaintiff and defendant now by mesne conveyances severally hold distinct parcels, constitutes a perpetual restriction on the use of the part now owned by the defendant, in the nature of a servitude or easement, on the observance of which the plaintiff, as the owner of the other part of the original parcel, has a right to insist.

"It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or

rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But, in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law. The benefit of the condition would in such cases inure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who held it or any part of it subject to the condition. . . . There is nothing in the case before us which in any degree tends to show that there was any intent on the part of the grantor and grantee in the original deed by which the condition was annexed to that grant of the land now owned by the parties to this suit, to give any other or different effect to the condition than that which would result from it at common law."

A tract of land was divided into thirty-three lots, eighteen of which were sold subject to restrictions, and fifteen without restrictions, seven of which were sold without restrictions at the time of the purchase by complainant's grantor. Held, that there was no general scheme of development shown, although all of the lots on the avenue on which complainant's property was located was subject to the same restrictions as were imposed on complainant's lot. *Sailer v. Podolski*, 81 N. J. Eq. 327, 88 Atl. 967 (1913). There was nothing to indicate that any defined purpose existed or was recognized with relation to any segregated portion of the tract different from other portions of the tract, except the mere circumstance that the deeds for the lots located on the same street with complainant's are found to have contained the restrictive covenants.

The owner of a tract divided into lots bordering on either side of a street conveyed nearly all of the lots without restric-

tion. Subsequently he conveyed a lot and provided in the deed that no building should be erected on the lot within a certain distance of the street. Thereafter the defendant became the owner of this lot. The grantor afterwards sold complainant a lot across the street and about one hundred and fifty feet from defendant's lot, imposing thereon a similar restriction. Held that, in the absence of a general scheme of improvement, complainant had no right to require defendant to observe the restriction in question. *McNichol v. Townsend*, 74 N. J. Eq. 618, 70 Atl. 965 (1908).

The owners of an estate had a block plan prepared thereof by their solicitors for the purpose of being deposited with the Urban Sanitary Authority, and from that plan a smaller plan was made, showing that the estate was to be divided into forty-six plots, and the ground plan of a house and no other building was depicted on each plot except one. The small plan was hung in the solicitor's office and was seen by intending purchasers. In addition, a printed form of agreement was drawn up by the solicitor for his own convenience, and which provided that the purchaser shall build upon his plot a dwelling house of not less than eight hundred pounds value, and contained a covenant not to erect any dwelling house or building other than the house agreed to be built, except a green house or conservatory at the back. These printed forms were altered and added to in the case of some of the stipulations, but not in regard to the stipulations here mentioned. Plaintiff purchased four lots according to the conditions in the form of agreement and built a house on each. Defendant, who was one of the vendors, acquired from his co-owner four plots, but they were not made subject to the particular conditions here stated. Defendant erected a billiard room, conservatory, and stables on his lots, some of which were opposite the plaintiff's lots. No representations relative to the existence of a general building scheme were made by the vendors to the plaintiff when he purchased, and no inquiry was made by the plaintiff as to whether the printed form of agreement was intended to be for the mutual benefit of purchasers. It was held that no definite building scheme

for the whole estate had been established. *Tucker v. Vowles* (1893), 1 Ch. 195, 67 L. T. Rep. 763, 62 L. J. Ch. 172, 3 Reports 107, 41 Wkly. Rep. 156 (1892).

A row of building lots were conveyed by the owners to various persons, at about the same time, and the covenants relative to all were substantially in the same form. In each conveyance the purchaser covenanted that he would build a house agreeable to a description in a plan drawn and signed by both purchaser and vendors; and that the outside of the building should not be altered after it was finished. The assignees of a purchaser were making an addition to the front of their house, and the assignees of the purchaser of an adjoining house filed suit to restrain such alteration as being contrary to the covenant under which the property was held. The conveyances of the lots did not make any reference to a plan, and no plan signed by any of the purchasers was produced at the trial. It was held that it was not shown that the covenants in question were intended to be otherwise than for the benefit of the vendors, and that the plaintiffs could not enforce them. *Sheppard v. Gilmore*, 57 L. J. Ch. 6, 57 L. T. Rep. 614 (1887).

§ 318. How intention to create general plan is ascertained.

The criterion in this class of cases is the intent of the grantor in imposing the restrictions, whether they are intended for his personal benefit, or for the benefit of the lot owners generally; and his intention is to be gathered from his acts and the attendant circumstances. If it sufficiently appears that his intention was to impose restrictions on the lots for the benefit of the grantees, the fact that as to some lots there are no restrictions simply takes those lots out of the general scheme. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936 (1901).

Whether or not restrictions were imposed by a lessor or grantor solely for his benefit or protection, or were intended by him to be for the common advantage of the grantees is a question of intention. If they were intended for the common advantage of all persons purchasing portions of the land, such purchasers and their assigns may enforce them

inter sese for their own benefit. *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 286, 1077, 36 L. R. A. 393 (1895).

In construing a covenant entered into in pursuance of a general plan, the objects and purposes had in view by the original promoters are to be taken into consideration. *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. (5 Dick.) 329, 24 Atl. 388 (1892).

Where all of the lots in a tract of land put up for sale for residence purposes, are subject to uniform restrictive covenants relative to the character of buildings to be erected thereon, and the deeds of conveyance to each purchaser contain such restrictions, it is evident that a general plan was intended, and a purchaser of a lot may enforce all other purchasers to observe such restrictions. *McNeil v. Gary*, 40 App. D. C. 397, 46 L. R. A. (N. S.) 1113 (1913).

In this case the court said: "Since all deeds from Saul and others to lots in this subdivision contain the same restrictive covenants it is apparent, we think, that those covenants were intended to inure, and did in fact inure, to the benefit of the several purchasers of said lots and subsequent owners thereof. As suggested in the bill, these restrictions were designed to carry out the general scheme of improvement of this subdivision. Each purchaser bought his lot with notice of the scheme, and, of course, with knowledge that every other purchaser would be influenced by it. In other words, the common understanding evidenced by these restrictive covenants induced each purchaser. Under such circumstances, it is plain that one owner has standing in equity to compel another to comply with the terms of his grant."

Courts incline to construe negative easements as continuing in favor of the grantor and all grantees holding under him. This is on equitable grounds rather than according to strict common law rules concerning covenants. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

It is not essential to the enforcement of restrictions as being a part of a general plan of improvement that the deed to the present owner refer by express terms to the general plan. If the nature of the restrictions in the deed is such that under the circumstances of the case they are referable

to such a plan, injunction will lie against the grantee who attempts to violate them. *Meriwether v. Joy*, 85 Mo. App. 634 (1900).

If it sufficiently appears that the intent of the grantor was to benefit the lot owners generally, it is not necessary, in order that the restrictions should be enforceable, that they should be exactly the same in all the deeds, if the differences are not substantial. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936 (1901). But it has been held that where the owner of a tract of land which has been divided into lots, sells the lots subject to restriction which are not uniform as to the various lots, that no right is thus created in the grantees of the lots which may be enforced by any one of them. *Schubert v. Eastman Realty Co.*, 25 Ohio Cir. Ct. Rep. 336, 15 O. C. D. 336 (1903).

The fact that one or two lots out of a large number in a tract of land are conveyed without restriction, does not of itself conclusively show the absence of a general plan of improvement. *Leader v. La Flamme*, ... Me. ..., 88 Atl. 859 (1913). And the fact that one lot, which was sold before the general plan was made, and another very small lot, were sold without restrictions is not inconsistent with the general scheme of the grantor imposing restrictions on the remaining lots. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936 (1901).

Nor does it indicate the absence of a general plan of improvement that a few of the lots in the district are conveyed with different restrictions than the rest, where they are differently situated and the restrictions imposed on them are in accordance with their situation, and their location with respect to the other lots was such that the other lots would derive little benefit from restrictions similar to those imposed on the other lots. *Thompson v. Diller*, 146 N. Y. Supp. 438 (1914).

The fact that the same restrictive covenants are incorporated in the deed of complainant and defendant, and that the common grantor inserted the same covenant in each deed he made in conveying any portion of his property, has been held not to be sufficient evidence of the covenant having been entered into for the benefit of other lands conveyed by the

same grantor. *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543 (1892); *Haines v. Einwachter*, ... N. J. Eq. ..., 55 Atl. 38 (1903).

The mere fact that a lessor, in granting a number of building leases of different parts of his property inserted in them similar covenants, did not constitute a building scheme. *Tubbs v. Esser*, 26 T. L. Rep. 145 (1909).

The fact that a common grantor retained a lot adjacent to one conveyed with restrictive covenants is insufficient, in the absence of a general scheme of development, to show that such restriction was imposed for the benefit of subsequent purchasers of the grantor's remaining lot. *Sauler v. Podolski*, ... N. J. Eq. ..., 88 Atl. 967 (1913).

"That circumstance," said the court, "cannot, in my judgment, be deemed operative to enlarge or define the covenant of the parties in such manner that it can with certainty be said to have been made for the benefit of subsequent purchasers of such adjacent lot."

It has been pointed out with the greatest emphasis that in cases of this class the right of complainant must be entirely clear before a court of equity can be justified in restricting another in the uses to which he may lawfully put his property.

The owner of a city block divided it into lots and imposed uniform restrictions thereon in conformity to a general plan of improvement adapted for dwelling houses. The block, with the exception of two or three vacant lots, was subsequently improved in conformity with the general plan. No attempt had been made by the vendor or purchasers of the lots, other than by the purchaser of a vacant lot, to change or abandon the general plan. It was held that no failure of the plan of restriction had been shown that would render the restrictions inoperative. *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911).

§ 319. General plan created by oral representations.

Where a tract of land is divided into lots, and persons are induced to purchase them partly by representations that the lots are restricted in their use, and that all deeds will contain restrictions of a designated character and purpose, and

the deeds are so executed, these facts constitute a general scheme, which may be enforced by any lot purchaser against any other purchaser. *Sanford v. Keer*, ... N. J. Eq. ..., 83 Atl. 225 (1912). In this respect it was said in the case last cited: "It is difficult to see how these representations could be made for the purpose of inducing the proposed purchasers to pay higher prices for the lots because of their protected condition, unless it was intended that this protection should inure to the benefit of the purchasers of the lots so protected; and that is the exact test which decides in favor of a general or neighborhood scheme."

One Davis was the owner of land on both sides of Eighth street between Second and Third avenues, in New York, and before disposing of any of the lots and in order to make that part of Eighth street a handsome residential section, formed a plan to set back the houses on both sides of the street a distance of eight feet, and so laid it out, and gave it the name of St. Mark's place. He then caused a diagram or map to be made of the place, showing a street seventy-six feet in width, which was an addition of eight feet on either side of the original sixty foot street. He then erected sixteen houses on the south side of the street, and thirteen on the north side, in conformity to this plan. All of these houses were of a superior class of dwellings, and all on a uniform line. Whenever he sold any of the houses or lots, he exhibited his plan to the purchasers, and represented to all who purchased, that the street was always to remain as laid out, and when he formed and laid out the street and built thereon, he gave up and dedicated the strip of eight feet of land on each side of the street to be used as a part and portion of the street in the manner that it was since used. All of the purchasers bought with notice that it was claimed that there were restrictions which would prevent them from acquiring a right as purchasers of lots to build upon the eight foot strip on either side of the street, and of the other facts as represented by Davis. Each purchaser, beginning with the first, had the agreement of Davis, on which he relied, that the lots not then built upon, should, when built upon, be covered with dwellings fronting on the line so established,

and that St. Mark's place should be kept open, and remain seventy-six feet in width. Every purchaser, buying after some of the lots had been built upon, not only had this agreement to induce him to purchase, but he had the further fact to influence him that as to those that had been built upon, there had been an execution of the plan adopted for the whole, and which they were assured was to be thereafter observed in building upon both sides of the street. The deeds of conveyance from Davis bounded the lots by the line of Eighth street as originally laid out, and contained a covenant that he owned it in fee, free from all charges and encumbrances. It was held that each purchaser acquired a right both as against all of the other purchasers and as against Davis to have the street so kept open and used, and the general plan of improvement carried out. *Maxwell v. East River Bank*, 3 Bosw. (N. Y.) 124 (1858).

The owner of a tract of land laid the same out into lots, which he sold under the oral representations that the whole tract was subject to certain restrictions which were contained in all of the deeds of conveyance. The owner intended to reserve two lots from the restrictions, but he had repeatedly made representations to purchasers that the entire tract was restricted. Subsequently he sold the two lots in question to the defendant without any restrictions, but the defendant had notice of the scheme of improvement and the restrictions under which all the other lots were sold. Held, that the purchaser of the two lots in question would be enjoined from erecting a building in violation of the restrictions imposed on the other lots. *Knapp v. Hall*, 20 N. Y. Supp. 42 (1892).

A lessee of a tract of land for 999 years sub-leased a portion thereof, representing to his lessee that no buildings should be erected so as to obstruct the sea view, because his lease contained covenants which restricted him from so doing. His lessee built on faith of such representations, and subsequent thereto he obtained a revocation of his own lease for 999 years, and took a new lease with the restrictive covenant omitted. It was held that he would be restrained from building so as to obstruct the sea view, on account of the oral representations he had made to his lessee, which had been

acted upon in good faith. *Piggott v. Stratton*, Johns. Rep. (Eng.) 341 (1859), affirmed in 1 De G. F. & J. 33, 1 L. T. Rep. 111, 29 L. J. Ch. 1, 6 Jur. (N. S.) 129.

Where a part of the promulgated scheme is that a specified portion of the land within the general plan shall be devoted to special purposes, which are held out to be advantageous to all the lots sold, an implied contract is thereby entered into by the owner with the lot purchasers that the named portion shall be devoted to the announced uses. Hence, any purchaser of a lot, or his grantees, may enforce the covenant against the grantor, or his grantees who purchased with notice of the implied covenant. *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276, 49 Atl. 801 (1901), affirmed in 63 N. J. Eq. 798, 52 Atl. 1130 (1902).

The owners of a tract of land adopted a general scheme for the improvement thereof, regulating the character of the buildings to be erected thereon and restricting their use. In conveying the lots they communicated such plan to the purchasers of some of the lots, and embodied the provisions thereof in covenants contained in the deeds. A number of the lots were thus disposed of, but those remaining were sold and conveyed by deed without any restrictive covenants, and to a purchaser who took without knowledge or notice of the oral agreement made by the owners regarding the entire tract. Held, that such purchaser was not bound by such restrictions. *Moller v. Presbyterian Hospital*, 65 N. Y. App. Div. 134, 72 N. Y. Supp. 483 (1901).

The court said: "The defendant purchased the property, basing its right to use it upon the record title, which contained no restriction interfering with the proposed use; and the mere circumstance that it may be said to have had notice of the fact that other property in the neighborhood had been restricted, is certainly not sufficient to charge it with notice of a verbal agreement of a restriction upon the property that it had purchased. And it appears that other portions of the block had been applied to a use which was in violation of the restrictions contained in the plaintiff's deed, as a church had been erected on the corner of Madison avenue and Seventy-first street."

§ 320. Lots not originally included in general plan.

Where a tract of land was conveyed with an agreement on the part of the grantees to subdivide and improve the same and to convey lots for dwelling purposes with certain building restrictions and an established building line, such restrictions were held not to be limited to the lots as originally plotted by the grantees, but as being equally applicable to lots thereafter formed by changes in the subdivision of the lands and in the location of the street lines. *Adams v. Howell*, 58 N. Y. Misc. 435, 108 N. Y. Supp. 945 (1907).

In pursuance of a general plan of improvement, a deed of conveyance of town lots contained a covenant on the part of the parties, their heirs, successors and legal representatives, restricting the property against use for the manufacture or sale of intoxicating liquors, and providing for forfeiture of the estate for violation of such covenant. Held, that the covenant was restricted to the lots thereby conveyed, and could not be enforced by purchasers of other lots whose deeds contained similar covenants. *Judd v. Robinson*, 41 Colo. 222, 92 Pac. 724 (1907).

The court said: "By its terms the covenant is limited to the land 'hereby granted.' In this respect it differs widely from covenants which in express terms or by reasonable or necessary implication, give notice that they are intended for the development or improvement of premises within a designated area, or for adjacent lots, or neighboring property. Again, the parties to the deed stipulate: 'For themselves, their heirs, successors and legal representatives,' thereby expressly limiting the covenant to the person named, which intention is further manifested by the condition of the forfeiture clause contained in the covenant, to the effect, that upon condition broken, the premises 'shall revert to the party of the first part, its heirs, successors and assigns.' "

§ 321. General plan including land not owned by grantor.

Where the owner of a tract of land adopts a general scheme for the improvement thereof and includes in his project land to which he has no title, but which he subsequently acquires title to, and conveys the same with restrictions, purchasers of

lots in the original tract owned by him may sue to enforce the restrictions against the purchasers of the subsequently acquired land. *Schmidt v. Palisade Supply Co.*, ... N. J. Eq. ..., 84 Atl. 807 (1912).

"I think," said the court, "the equitable right to enforce those restrictions became vested in every purchaser from the common grantor. In my view, it is immaterial when the common grantor acquires the title to any of the specific pieces of land in a general scheme, provided that at the inception of the scheme all the land involved in the controversy was contemplated and covered by the scheme, and notice is brought home to the different purchasers. If this is not held to be the law, it seems to me that gross injustice is thereby occasioned; whereas no inequity or injustice is visited upon anyone by the maintenance of this principle. The defendants here had full notice of the existence of a building scheme which embraced the lands they were purchasing. Their deed contained the restriction with reference to a map. The map contained their land and the land of the complainant, together with a great deal of other land. The advertising, the booklet, communications from the agents, and the personal knowledge of the purchaser all informed him of the existence of a general scheme embracing his land and that of the complainant. If, therefore, an owner of land projects a building scheme and includes in his project land to which he has not yet acquired title, and his scheme clearly defines the land including the land which he does not yet own, I think it proper to hold that when he acquires the land to which he did not have the title originally, and conveys it with restrictions, the purchasers of such subsequently acquired land will be answerable to the purchasers of the other land (that originally owned by the common grantor), provided there was a general building scheme of which they had notice, and the restrictions upon them are clearly defined. Since all of these elements are present in this case, I conclude that complainant is entitled in equity to proceed against defendants for the enforcement of the restrictions contained in the defendants' deeds, and that an injunction to prevent their violation and

to cause the removal of anything which does violate the restrictions."

§ 322. Where restrictions under general plan vary as to different sections of tract.

Where a tract of land is divided into lots and certain sections of the tract are restricted in accordance with the purposes for which the owner intends that the lots therein shall be used, the fact that the restrictions are not uniform throughout the entire tract does not prevent the scheme from being a general one for the improvement and benefit of the entire tract in respect to the restrictions that are applicable to the entire tract.

In a case in which this question was involved the court said relative thereto: "It is true that these restrictions varied in different sections in accordance with the design of the promoters for the character of such sections, respectively; but this does not interfere with the integrity of the neighborhood scheme. Under such circumstances the covenants applicable to each section become, to a certain extent, a separate scheme for that section; the various covenants on the different sections forming a general scheme for the whole only in so far as they contain features common and beneficial to all." *Sanford v. Keer*, ... N. J. Eq. ..., 83 Atl. 225 (1912).

§ 323. Auction sale of lots.—Some lots unsold.

Where lots are advertised by the owner to be sold at auction with certain restrictions imposed upon their use, it might well be said, that in case not all of the lots are sold, that the purchasers at such sale should have the right to insist that the remaining lots should be sold with similar restrictions imposed in their favor. However, the contrary has been held.

The owner of eight lots advertised that they would be sold at auction under restrictions as to their use. At the sale only three of the lots were sold. Held, that the advertisement had no effect on the lots remaining unsold, which were subsequently conveyed without restrictions. *McCusker v. Goode*, 185 Mass. 607, 71 N. E. 76 (1904).

The court said: "If the lots had all been sold according to the terms of the sale, and deeds made accordingly, the facts would have justified, if not required, a finding that there was a general scheme of improvement in the division of the land into lots and the sale of them with restrictions, which was intended to give every purchaser the benefit of the restrictions.

"There is good ground for contending that after a sale upon such terms, and some of the lots were retained by the vendor, a purchaser would have a right to insist that his deed should contain a stipulation that the remaining lots should be held and sold subject to the same restrictions. Thereby he would acquire an easement in the remaining lots, giving him the same rights in regard to their sale as he would have in regard to the lots already sold subject to the restrictions. It is the policy of our law in regard to the recording of deeds that persons desiring to buy may safely trust the record as to the ownership of the land, and as to incumbrances upon it which are created by deed. There was nothing contained in any deed which purported to restrict the use of the lot sold to the defendant. Restrictions contained in three deeds made at or about the same time, and in another made a considerable time before, would not show that the restrictions were imposed upon other lands which remained unsold. The statement in regard to restrictions in the advertisement of the auction sale was of no effect upon land that was not sold, and which afterwards came to the defendant."

A purchaser of a lot at public auction under a general plan of improvement can enforce restrictions only as against lots shown on the sale plan as subject to the conditions of the sale at which he purchased. *Rowell v. Satchell* (1903), 2 Ch. 212, 89 L. T. Rep. 267, 73 L. J. Ch. 20.

Part of an estate was put up for sale at auction, in lots subject to restrictive provisions relating to buildings to be erected thereon. At the sale only one lot was sold. It was held that the purchaser was entitled to the benefit of the contract implied in the restrictive conditions as against the lots remaining unsold, and to have the same expressed in the conveyance to him of his lot. *Birmingham & District Land*

Co. v. Allday (1893), 1 Ch. 342, 67 L. T. Rep. 850, 62 L. J. Ch. 90, 3 Reports 84, 41 Wkly. Rep. 189, 15 Eng. Rul. Cas. 285. In this case the court seemed to take it for granted that the fact that only one lot was sold did not affect the matter in the least, and this position is clearly a correct one. It merely considered whether or not there had been the establishment of such a general scheme as to entitle purchasers of lots at the sale to enforce the restrictions in reference to all the other lots in the estate.

§ 324. Effect on general plan of selling some lots without restrictions.

Where a tract of land is laid out and restricted and improved according to a general scheme, the fact that some of the conveyances of lots therein do not contain restrictions will not defeat the same. Although some of the lots may have restrictions imposed upon them and others not, if the general plan has been maintained from its inception, if it has been understood, accepted, relied on, and acted upon by all in interest, it is binding and enforceable on all *inter se*. It goes with the land, and is equally binding on all purchasers with notice. *Allen v. Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890 (1911).

The owner of a tract of land subdivided the same into lots and sold some of them with a restriction in the deeds against the building of anything but a two story dwelling house and the necessary out-buildings thereon, and sold other of the lots without restriction. It was fairly to be inferred, however, from the evidence, that the general plan of confining the use of the property to residential purposes was understood by all purchasers of the lots. It was held that the grantee of one of the restricted lots could enforce observance of the restriction by the owner of another lot whose deed contained a similar restriction regardless of the fact that some of the lots had been conveyed without restriction. *Frink v. Hughes*, 133 Mich. 63, 94 N. W. 601, 10 Det. Leg. N. 106 (1903).

The defendant in this case contended that the restrictive clauses were only available because the original plan was a plan to exclude everything but residences from these lots.

and that, as the grantors had conveyed some of the lots without inserting the restrictive provisions, the scheme had failed, and that purchasers had the right to disregard their restrictive covenants. "If this be true," said the court, "it must be because equity relieves the defendant from the performance of a plain duty which he assumed at the time of accepting this grant. Why should equity grant such relief from this contract? The complainants stand bound by their contract equally with the defendant, and bought in view of the purpose of excluding everything but residences from this property. It would certainly be inequitable to bar them of a right of enforcing this agreement on the part of the defendant by any act of his grantor, and, unless the defendant has some superior equity to be relieved of his contract, the court should hesitate to relieve him.

"In a class of cases we have held that, where the grantor has subsequently made grants to others without restriction, and under such grants the purposes of the original restriction have been frustrated as a matter of fact at the time the bill is filed, no relief will be granted. This question has been raised in this state in construing provisions restricting parties from selling intoxicating liquor on premises. . . . Although some of these lands have passed out of the original grantor by conveyances not containing the restrictive clause, yet they have passed into the hands of parties who have thus far observed the original purpose. There has been in fact no substantial departure from the original scheme as to the entire plan. The defendant has not, therefore, had his property subjected to any diminution in value because of the departure from such scheme. More than this, as to such restrictions as are contained in this deed, it does not necessarily follow that, because a restrictive covenant is not inserted in deeds of all the property of this entire plat, therefore this restrictive clause is of no effect."

The fact that, in a tract of 128 lots, of which 90 lots had been sold subject to uniform restrictive covenants, two were sold without restrictions before the owners fully decided upon the form of building restrictions they would subject the lots to, but which were sold with the understanding that they would

be used only for residence purposes, and that two others were sold subject to restrictions different from the rest, did not prove that the covenants were not inserted in pursuance of a general scheme of the owners to establish an exclusively residential district. *Velie v. Richardson*, ... Minn. ..., 148 N. W. 286 (1914).

§ 325. Modification of general scheme.

Where restrictions imposed on land in pursuance of a general scheme have been modified to some extent by the elimination of some of their prohibitive provisions, either by general consent or acquiescence therein by the interested parties, and where such modification is not of such a nature as to destroy or impair the mutual benefit to the lot owners of the essential general scheme upon the protection of which they relied, such modification will not prevent the enforcement of the remaining provisions of the restrictions. *Sanford v. Keer*, ... N. J. Eq. ..., 83 Atl. 225 (1912).

Lots in a tract of land were used and improved under restrictions which confined their use to residential purposes, one dwelling house to be occupied by one family only on each lot, such dwelling house to be set back from the street in accordance with a line established by the restrictions, and to cost at least five thousand dollars. As incidental to this general purpose, there was also a start made to restrict against out-buildings of any character, but this part of the restrictions, where it was imposed, had been modified by mutual acquiescence, by the insertion, in some of the conveyances, in connection with the dwelling house covenants, of the phrase "with necessary or desirable out-buildings," and by its violation, in one or more instances, by the erection of a garage on the rear of a lot upon which a dwelling house was constructed in conformity with the dwelling house restrictions. In this case the court declared that it did not think that this modification of this incidental feature was of such a nature as to destroy or impair the mutual benefit to the lot owners of the essential dwelling house scheme upon the protection of which they relied. "So far as the modification of what may be called the incidental 'no out-house scheme' is concerned, of course,

defendant's covenant is likewise modified, so that his burden will correspond with his benefit; but, as to the main essential purpose of the neighborhood dwelling house scheme, we think that defendant's lot continues to participate in its benefit, and consequently remains subject to its burden." *Sanford v. Keer*, ... N. J. Eq. 83 Atl. 225 (1912).

§ 326. Creation of general plan by sale with reference to plat.

The owner of a tract of land laid out a town site thereon and sold lots to purchasers with reference to the plat, which showed certain grounds designated as public grounds. It was held that the purchasers of such lots acquired in reference thereto a vested right in and to such adjacent grounds as were designated public grounds on the plat, to the full extent that such a designation imports, and that any one of such purchasers might enjoin the diversion thereof by the original proprietor. *Fisher v. Beard*, 32 Ia. 346 (1871).

A camp meeting association, owning a tract of seaside land, laid out and mapped the same in lots, reserving a tier of blocks, extending from the ocean westward, as a "camp ground" for religious services and tenting purposes, and sold to complainant certain lots shown by this map to be fronting on the blocks so reserved, on which he erected a summer residence. Held, that the association could not thereafter divide the blocks so reserved into lots for the purpose of leasing them for a term of years, with the privilege of erecting permanent cottages thereon, as it had by its conveyance in reference to the plat entered into an implied covenant with the complainant that the blocks in question should be devoted to the use designated. *Lennig v. Ocean City Association*, 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16 (1886).

The owner of a block of land filed a map showing a five-foot strip adjoining the street reserved for court yard, and agreed with the owners of an adjoining block, which agreement was duly recorded, that the buildings to be erected on the land should be set back five feet from the street line, and subsequently he conveyed his land subject to this restriction. Held, that each of his grantees acquired a right appurtenant

to his property in the five-foot strip which he was entitled to enforce in equity against all other grantees of lots in the block holding under such restrictions. *Batchelor v. Hinkle*, 132 N. Y. App. Div. 620, 117 N. Y. Supp. 542 (1909).

A grantor who subdivides his land into lots and streets and files a plat thereof with the county clerk as a matter of public record, cannot thereafter convert any part of the streets to private use, and a purchaser of a lot may enjoin a change, either in the location or width of the streets, without first showing that the same will result in the depreciation of his property. *Herold v. Columbia Inv. & Real Estate Co.*, 72 N. J. Eq. 857, 67 Atl. 607 (1907).

In this respect the court said: "The attempt of the defendants to alter the location and narrow the width of certain of the streets delineated on the original map is clearly an infringement of the rights of the complainant; and for the protection of such rights he is entitled to the aid of a court of equity. Whenever the owner of a tract of land lays it out into lots and blocks upon a map, and on that map designates certain portions of the land to be used as streets, and then conveys those lots with reference to the map, he becomes bound to the grantees not to use the portion so devoted to the common advantage otherwise than in the manner indicated; the grantees are regarded as purchasers, by implied covenant, of the right to use the streets as a means of passage to and from their premises as appurtenant to the premises granted. This private right is wholly distinct from, and independent of, the right of passage to be acquired by the public," and the object of the principle is not to create public right, but to secure to persons purchasing lots under such circumstances those benefits the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out as indicated on the plan.

The owner of a tract of land divided the same into lots and streets, made a map thereof, filed the same with the county clerk as a public record, and proceeded to sell lots as shown on the plat. It was held that in the absence of a general scheme calling for the erection of but one building on a lot, that there was no implied covenant on his part to sell the

lots only in their size as shown on the map, but that he might subdivide the lots into smaller parcels and sell them as he might choose, or devote some of them to public use, such as streets, parks, etc. *Herold v. Columbia Inv. & Real Estate Co.*, 72 N. J. Eq. 857, 67 Atl. 607 (1907).

§ 327. Creation of general plan by partition of property.

Where the tenants in common of a tract of land, in contemplation of its division into small parcels, restricted the use of such parcels to residence purposes, and for that purpose adopted a general scheme of improvement and united in mutual covenants upon partitioning the property, "subsequent purchasers with knowledge of the scheme had a right to rely upon the observance of the restriction by every other purchaser, irrespective of whether the restriction was referred to in the deed to him and whether such other purchaser happened to derive title from the same grantor, because, conceding such to have been the uniform scheme adopted, it would be absurd to hold that a grantee could not restrain a violation on the part of his immediate neighbor, who derived title from the same grantor, although he could enjoin precisely the same act on the part of the owner of a parcel, more remotely located, obtained from a different grantor." *Silberman v. Uhrlaub*, 116 N. Y. App. Div. 869, 102 N. Y. Supp. 299 (1907).

§ 328. Special covenant to one grantee in general plan.

Trustees of building property under an order of a court of chancery sold lots therein, one of which was sold for the purpose of a public house, and the trustees covenanted with the purchaser that they would take covenants from all purchasers of other lots against the use of their premises for "a public house, tavern, or beer shop." A gas company purchased one of the other lots, and sold the same to the defendant, who let the house erected on his lot to one B as a tenant from year to year. B obtained a license for the sale of beer to be consumed off the premises, and carried on trade under his license. The restrictive covenant above mentioned had been inserted in the conveyance to the gas company and to A. It was held

that the purchaser of the lot intended for use for a public house was entitled to the benefit of the covenant contained in the conveyance to the gas company and to A, and that he could enforce observance thereof by them, and could restrain them from using the premises as a beer shop. *Nicoll v. Fenning*, L. R. 19 Ch. Div. 258, 45 L. T. Rep. 138, 15 L. J. Ch. 166, 30 Wkly. Rep. 95 (1881).

§ 329. Question of general plan one of fact.

It is a question of fact to be determined from the language of the covenant and the circumstances in each case whether restrictions were merely matters of agreement between the vendor and the several purchasers for the protection of the vendor, or were intended to be for the common advantage of the several purchasers. *Sheppard v. Gilmore*, 57 L. J. Ch. 6, 57 L. T. Rep. 614 (1887).

The intention of the common grantor that the covenant should inure to the benefit of the neighboring lots, whether held by the owners under deeds prior or subsequent to the complainant's has been found from several species of circumstances: for instance, by the vendor binding himself in the deed conveying the defendant's parcel of land to observe the restriction in the use of his other property in the vicinity, and to insert the same restriction in all conveyances he might make of parcels of it, thus making the covenant a reciprocal one between him and the vendee.

More frequently a purpose to make the restriction reciprocal and binding on all persons who should buy lots in the vicinity from the vendor is inferred from the circumstance that a building plan had been devised and declared by him in some manner to convey notice thereof.

Of course, the purpose and notice of it may be proved by other facts, by any which fairly tend to prove them. And in this respect we are to bear in mind the conclusion drawn in many cases in favor of subsequent grantees from the circumstance of the vendor having executed a prior conveyance burdened with a restriction inuring to the benefit of the land retained by the vendor. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547 (1909).

§ 330. Donee of property.

A person who accepts as a gift a conveyance of land charged with a restrictive covenant, merely stands in the place of the donor, and all the notice which the donor had at the date of the gift is imputed to his grantee or donee, who pays nothing for his deed. The restrictive covenant, therefore, may be enforced against such donee to the same extent it could have been enforced against the donor. *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276, 49 Atl. 801 (1901), affirmed in 63 N. J. Eq. 798, 52 Atl. 1130 (1902).

§ 331. Against one grantee when other grantees of restricted lots have been released.

Where several grantees take property at the same time and agree not to use the same for the sale of intoxicating liquors, such restriction will be enforced against one of the grantees although other of the grantees have disposed of their property and the purchasers took the same free from such restriction. *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 476, 29 Am. St. Rep. 218 (1892).

§ 332. When grantor is bound.

Whether or not the grantor of land is bound by restrictions contained in his deed of conveyance depends upon the intention of the parties to the deed as evidenced by the language of the covenant. He is not bound by a covenant in which the grantee merely covenants in relation to the use of the land conveyed to him. On the other hand, he will not be permitted to do anything calculated to destroy the effects of covenants he has imposed on lands sold by him for the benefit of the various purchasers.

It does not necessarily follow that, because a vendor has imposed restrictions on a lot sold by him, his adjoining land is to be subject to the same restrictions, or that because he binds himself personally by covenants in reference to restrictions that they are to follow the land and bind his heirs and assigns. Whether or not he has imposed restrictions on the use of his remaining property is a question of fact to be determined by the intention of the parties. *Wood v. Stehrer*, 119 Md. 143, 86 Atl. 128 (1912).

Trustees under a will of an estate offered the land for sale at auction, according to a plan and particulars and conditions of sale referring to a deed of mutual covenants, which was to be executed by the vendors and each of the purchasers. The deed provided that it was intended to be a part of all future contracts for sale of the plots that the several purchasers should execute the deed, and be bound by the stipulations contained in it; and it was expressed that each purchaser covenanted with the vendors and with the other purchasers to conform to certain restrictions as to the mode of building on the plot, but there was no express covenant to a like effect by the vendors. Several plots were sold, and the purchasers and vendors executed the deed. For twenty years such stipulations were observed, and when plots were sold the purchasers executed the deed. At that time the trustees put up for sale a portion of the estate in different blocks, and under conditions authorizing a mode of building which was not in conformity with the stipulations contained in the deed. In an action brought by purchasers who had executed the deed, to enjoin the trustees from selling in violation of the terms of the deed, it was held that the provisions of the deed were not mere expressions of intention which the vendors were at liberty to change, but the effect thereof was that the vendors thereby entered into a covenant not to authorize the use of the unsold plots in a manner inconsistent with the conditions of the building scheme as therein expressed; that even if the deed had not the effect of a covenant of the vendors, yet the trustees were bound by a contract, implied from the whole transaction, restricting their dealing with the land in violation of the building scheme, and that an injunction would be granted. *Mackenzie v. Childers*, L. R. 43 Ch. Div. 265, 62 L. T. Rep. 98, 59 L. J. Ch. 188, 38 Wkly. Rep. 243 (1889)

In this case it was said that it was not a question of what the vendors might mean—not whether in their own minds they intended to reserve a power of departing from the bargain, but what the purchaser would understand by the words—what effect they were intended or calculated to produce upon him.

§ 333. Restrictions imposed for the benefit of other land of grantor.

A vendor may impose restrictions on land which he sells for the benefit of his remaining land in such manner as may be binding on the vendee and his assigns, although they are not what are strictly covenants running with the land, and the vendor may likewise impose burdens upon his remaining land for the benefit of that sold so that his heirs and assigns may be bound by the restrictions. It is not essential that a tract be divided into a number of lots in order that these principles be applied. It has been judicially declared that, "It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales are made, but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan." *Wood v. Stehrer*, 119 Md. 143, 86 Atl. 128 (1912).

In New Jersey the rule is stated as follows: "It is settled by adjudication in this state, as a general rule, that where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee, whatever may be its form, whether covenant, condition, reservation, or exception, which restricts the enjoyment of the portion of the land which is conveyed in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, whether it runs with the land and is binding at law or not, it will be enforced in equity against the grantee and anyone subsequently acquiring title to the land with notice of it, at the instance of the grantor, or of the subsequent owner or owners of parts of the remaining land, when its violation results in material detriment to the portion of the remaining land which the complainant in the suit holds." *Hayes v. Waverly & Passaic R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648 (1893); *Cornish v. Wiessman*, 56 N. J. Eq. 610, 35 Atl. 408 (1896).

When it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve

a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land. *Whitney v. Union R. Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715 (1858).

However, it is always a question of the intention of the parties; and, in order to make this rule applicable, it must appear from the terms of the grant, or from the situation and surrounding circumstances, that it was the intention of the grantor in inserting the restriction to create a servitude or right which should inure to the benefit of the land conveyed, and should be annexed to it as an appurtenance. *Beals v. Case*, 138 Mass. 138 (1884).

Where the owner of land divides it and sells part of it, imposing on his vendee a restriction as to its use, there is a presumption that he imposes such restriction for the benefit of the part which he retains. This conclusion, however, is not universal. Circumstances may exist which repel it, or under which a court of equity would not be justified in saying that such was the purpose of the vendor and the assent of the vendee. *Coughlin v. Barker*, 46 Mo. App. 54 (1891).

While the fact that the restriction contained in a particular deed was part of a general plan is of the greatest importance in the solution, and in many cases controlling, of the question whether a restriction is personal or for the benefit of other land, it does not follow that the absence of evidence that it is part of a general plan negatives the conclusion that it was intended for the benefit of a particular adjacent estate. The situation of the two parcels of land in respect of each other may be such as to render such a conclusion unavoidable, as, for instance, where a vendor sells one adjoining parcel, with an agreement not to build upon the other, in which case the conclusion is unavoidable that he annexes to the parcel sold an easement of light, air, and view, in respect to the parcel

retained. But where the restriction is no part of a general plan, and there is nothing in the language of the deed, when interpreted by surrounding circumstances, from which it can be fairly inferred that the restriction was intended for the benefit of any particular piece of land retained by the vendor, the covenant cannot be enforced by one who subsequently acquires from the vendor the particular piece of land, or by the vendor for the exclusive benefit of such subsequent purchaser. *Coughlin v. Barker*, 46 Mo. App. 54 (1891)

A covenant by the grantee of one parcel of land, for the benefit of other adjacent land of the grantor, will pass to a subsequent grantee of the latter tract, and may be enforced by him against the original covenantor. *Brockmeyer v. Sanitary District*, 118 Ill. App. 49 (1905).

The owner of property cannot enforce the observance of restrictive covenants imposed on an adjoining estate merely because similar restrictions are contained in his deed, when the restrictions were no part of a general scheme under which the lots in the tract were all to be subject to restrictions for the benefit of the several owners. *Clark v. McGee*, 159 Ill. 518, 42 N. E. 965 (1896). In this case it appeared that there were a number of lots in the tract, but the deeds to some of them contained no restrictions, and to others on which restrictions were imposed the restrictions were not uniform.

The original grantor in imposing the covenant upon the grantee either may or may not bind himself. If he does not bind himself, then his grantee, having no right of action against him, cannot pursue any other grantee to whom he may subsequently convey the whole or a part of the remaining land. *Genung v. Harvey*, 79 N. J. Eq. 57, 80 Atl. 955 (1911).

"There can be little, if any, difference in principle between a restrictive covenant made by a vendee for the benefit of the remaining land of his vendor and one made by the vendor touching his remaining land for the benefit of his vendee. Both are held to be enforceable by a purchaser of the land for the benefit of which the covenant has been made against a purchaser of the restricted land who is chargeable with notice of the covenant." *Wootton v. Seltzer*, ... N. J. Eq. 90 Atl. 701 (1914).

§ 334. Same subject.

Where the owner of two adjoining lots sells one and retains the other, and inserts in the deed of the one he sells a covenant against building in a certain way, which covenant is manifestly intended for the benefit of the lot retained, and he afterwards sells this lot to another, the covenant passes to the assign as an appurtenance to the lot, or as an easement for the benefit of it, and the assign may enforce it against the owner of the other lot, whether he acquired the other lot immediately from the original vendor or through mesne conveyances, or by devise, descent, or otherwise, from him; provided he took with notice of it, actual or constructive.

Such a restriction in the land conveyed is generally construed to have been intended by the parties for the benefit of the land retained by the grantor, since in most cases it could obviously have no other purpose. Nor does it defeat this conclusion, that the purpose is not expressed in the deed, or that the deed contains no reciprocal covenant on the part of the grantor to observe a like restriction in respect of the land retained by him. However, the absence of such expression of intention, and even more the absence of such mutuality of restriction, is an evidentiary circumstance tending to show that the restriction was intended by the grantor of the lot subject thereto for his own benefit personally, and not for the benefit of adjoining land retained by him. *Coughlin v. Barker*, 46 Mo. App. 54 (1891).

When an owner sells a portion of his land and imposes restrictions thereon for the benefit of his remaining land, the right to enforce the same passes to a subsequent grantee of the vendor. *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. 164, 50 Atl. 14 (1901), affirmed in 63 N. J. Eq. 804, 52 Atl. 1132 (1902); *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583 (1899).

A grantor may impose a restriction in the nature of a servitude or easement upon the land that he sells or leases, for the benefit of the land he still retains; and if that servitude is imposed upon the heirs and assigns of the grantee, and in favor of the heirs and assigns of the grantor, it may be enforced by the assignee of the grantor against the assignee

(with notice) of the grantee. *Summers v. Beeler*, 90 Md. 474, 45 Atl. 19, 48 L. R. A. 54, 78 Am. St. Rep. 446 (1899).

Where a grantor conveys land by deed in which the grantee covenants that neither he nor any person claiming under or through such conveyance shall erect upon the premises any building of more than a specified depth, which covenant is declared to be continuing and for the benefit of owners of other lots then owned by the grantor, so that said lot may have "freedom of air, light and vision," a subsequent purchaser of one of the other lots conveyed by deed granting the easements, covenants, privileges, etc., belonging thereto, may enforce such covenant so long as it is of any value to his lot. *Lattimer v. Livermore*, 72 N. Y. 174 (1878).

The owner of two lots situated on opposite sides of the same street, conveyed one with a restrictive clause prohibiting the erection of any building or improvement thereon "more than two hundred feet beyond the southermost boundary line of lot of Amelia R. Sparks, looking towards the ocean, nor within a space of fifteen feet from the westerly side of said Park place," without the consent of the grantor or her heirs. Held, that the restriction was for the benefit of the lot retained by the grantor, and passed as appurtenant thereto to her grantee thereof. *Hemsley v. Marlborough House Co.*, 68 N. J. Eq. 596, 61 Atl. 455 (1905), reversing 65 N. J. Eq. 167, 55 Atl. 994 (1903).

"We dissent," said the court, "from the conclusion of the learned vice-chancellor that the right reserved is a personal one. The reservation to 'heirs' implies an heritable interest, and an heritable interest is one which is attached to the ownership of land. The only land of Mrs. Disston (the grantor) for the benefit of which the clause under consideration could have been inserted, so far as the proofs disclose, was the 'Disston Cottage' property. That it is useful and beneficial to that property, providing for it better light, air and prospect, is obvious; and, therefore, although the clause does not say, in terms, that the right of consent is reserved to Mrs. Disston and her heirs as owners of this property, it seems to us that this is the necessary implication. To disregard the effect usually attributed to the word 'heirs,' when used as it

is in the restriction before us, and to hold that the right therein reserved is personal to Mrs. Disston and her heirs, is to conclude that it was the intention of the parties to the conveyance that although Mrs. Disston might part with the 'Disston Cottage' property the day after the making of the conveyance now under consideration, nevertheless the right to enforce these restrictions against the owners of the defendant's property should remain to her as long as she should live and to her heirs afterwards until the death of the last survivor of them. The fact that there could be no object in such a stipulation condemns such a construction of the reservation."

A covenant in a deed to a lot of ground restricting the building to be erected thereon to a private residence to cost not less than fifteen hundred dollars, and establishing a building line for the residence and also for out-buildings, may be enforced by the grantor so long as he continues to own any part of the tract of which the lot was a part and for the benefit of which the restrictions were imposed. *Firth v. Marovich*, 160 Cal. 257, 116 Pac. 729 (1911).

The owner of a tract of two hundred and eighty-six acres of land conveyed three parcels thereof to one L by deed containing the following restriction: "Provided, however, that the property herein mentioned shall be used only for residence purposes and that each dwelling erected thereon shall not cost less than four thousand dollars, and further provided that no liquors shall be sold on the premises." Thereafter L conveyed one of his parcels to one S, subject to the same restriction, but conveyed the other two parcels to other purchasers without restriction. Subsequently the original owner of the entire tract conveyed a number of parcels to different persons without any restrictions, and thereafter the remaining part of the property in the tract was sold under mortgage without restriction. Held, that only the grantors in the deeds containing the restrictions could enforce them, and since they no longer had any interest in any part of the land the restrictions could not be enforced by them. *Foreman v. Sadler*, 114 Md. 574, 80 Atl. 298 (1911).

A restriction in a deed that no hotel should ever be erected on the land thereby conveyed, was not inserted for the benefit

of other land on which the grantor held a mortgage. *Tibbets v. Tibbets*, 66 N. H. 360, 20 Atl. 979 (1890).

The owner of two adjoining lots conveyed them to the same grantee at different times subject to a restriction contained in both deeds that no building should be erected thereon nearer to the street than fifteen feet. The restriction was not imposed in pursuance of any general plan of improvement, and the grantor owned no other property in the vicinity. Held, that upon the owner's conveyance of the second lot he lost the right to enforce the restriction on the first lot conveyed, and that by reason of this fact the grantee had no such right, and also by uniting in her of the two lots, the grantee likewise lost any right to enforce such restriction. *Gensung v. Harvey*, 79 N. J. Eq. 57, 80 Atl. 955 (1911).

A tract of undivided land was sold with a restriction that only private dwellings should be erected thereon, and nothing appeared to show that it was the intention to divide the land, but the grantee did divide the same and sell lots without mentioning the restriction in the deeds. Held, that the covenant was exacted for the benefit of the original grantor and his remaining lands, if he had any, and could only be enforced by him or his assigns. *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 687, 37 L. R. A. (N. S.) 1, 127 Am. St. Rep. 925 (1908).

Where the owner of a tract of land in a residential district conveyed a part thereof subject to a restriction whereby the grantee agreed not to erect any building or buildings on the premises except for residence purposes, such restriction was for the benefit of the remaining portion of the tract, and therefore enforceable by the subsequent owners thereof. *Appel v. Buckbinder*, 82 N. Y. Misc. 312, 143 N. Y. Supp. 710 (1913).

The owner of a tract of city land conveyed the westerly portion thereof with a restrictive building covenant. Subsequently he conveyed to others the remainder of the tract without restrictions. Held, that a subsequent grantee of a portion of said westerly part, claiming under deeds containing no such restrictions, could not enforce such covenants against a subsequent grantee of the remainder of said westerly part; the covenants being intended for the benefit of the original

owner and his grantees in their enjoyment of what remained of the tract after the conveyance of the westerly portion, and further because the original grantee of the westerly portion could have had no easement, arising out of such restriction, in one part of her plot over another portion of the same. *Barney v. Everard*, 32 N. Y. Misc. 648, 67 N. Y. Supp. 535 (1900).

The owner of three adjoining lots conveyed on the same day to three different persons, and the deed to the middle lot contained this clause: "It is further understood, conditioned and agreed by and between the said parties hereto that said William C. Hough, his heirs and assigns, shall not nor will at any time hereafter erect or build on the said hereby granted lot any building or part of a building further westward than thirty-seven feet from the line of Ninth street, except a privy and bath house, not exceeding six feet in depth and sixteen feet in height, from the lower floor of the house, nor erecting on the said lot, to the eaves of the said bath house." No reference was made in the other deed to such building restriction, but reference was made in them to the fact of the conveyance of the lot on the same day to the grantee mentioned in the deed. It was held that such restriction was intended to create an easement of light and air in favor of the adjoining lots, and could be enforced by the owners of such lots. *Muzzarelli v. Hulshizer*, 163 Pa. St. 643, 30 Atl. 291 (1894).

Restrictions on the use of land ought not to be held to be imposed for the benefit of an adjacent lot of land, in the absence of any words in the grant itself implying it, unless the circumstances and situation at the time of the grant were such as to make it manifest that the condition or restriction or reservation was intended to be for the benefit of such adjacent lot, and to be annexed to it as an appurtenant.

The owner of a number of city lots adopted a plan that buildings erected on any of the lots more than twelve feet in height should be of brick and stone, and generally inserted a restriction to that effect in the deeds of conveyance thereto. The city in which they were located authorized the purchase of two of the lots, one on the south and the other on the north side of a street, and the city council in authorizing the same

provided that the lot on the north side of the street should be forever kept open, and the expenditure was charged to the appropriation for schoolhouses. The deed of conveyance to the north lot provided that "no building shall ever be erected on" the granted premises. Subsequently a lot adjoining the north lot was conveyed to a savings bank without mention of any right relative to keeping the north lot unbuilt upon, and a bank building was erected thereon. Thereafter the city threatened to erect a wooden building over twelve feet in height on the north lot, and the savings bank brought suit to enjoin the erection of any building thereon. It was held that the savings bank had no right to have the lot in question to remain open. *Lowell Institution for Savings v. Lowell*, 153 Mass. 530, 27 N. E. 518 (1891).

The burden of proof in this case was held to be on the plaintiff to show, by the terms of the grant to the defendant, or from the situation and circumstances, that it was the intention of the grantor in inserting the condition to create a servitude or right which should inure to the benefit of the lot of land now owned by the plaintiff, and which should be annexed to it as an appurtenant. The court continued: "If such a servitude was imposed for the benefit of the lot now owned by the plaintiff, it must have been at the time of the grant to the defendant. Nothing that has happened since could impair the defendant's title in this particular, without its consent. We are therefore to look to see if enough can be found in the deed itself, or in the situation and circumstances, fairly to show that any such right or easement was then created in favor of the lot which the plaintiff afterwards bought. In the first place, it is apparent that the idea of keeping the lot open originated with the defendant. The original owners never had a scheme or plan that their lots in this neighborhood should not be built upon at all, but only that the buildings must be of brick and stone. This latter requirement is not mentioned in the deed to the defendant, and there is nothing to show that the defendant had notice of it. The ruling that the defendant's land was not subject to that restriction was right. The first suggestion of keeping

the lot open is found in the vote of the city council authorizing the purchase of the two lots, one on the south side of Middle street and the other, being the lot now in question, on the north side, 'the latter to be forever kept open'; and the expenditure to be charged to the appropriation for grammar and primary school houses. On the same day a resolution was passed authorizing the erection of a grammar school house on the south lot. The deeds of the two lots were taken simultaneously a few weeks afterwards. The deed of the north lot contains the clause upon which the plaintiff now relies.

"It is to be observed that the deed contains no mention that this condition is imposed for the benefit of the adjacent lands, that no earlier deed had mentioned any scheme or plan to keep the lot open, that in point of fact there was no such scheme or plan, and that the lot now owned by the plaintiff was then vacant land, bounding on three sides on public streets, and in part, on one of these three sides, on a passageway. Even if facts which took place afterwards could be looked at, the deed to the plaintiff executed several years later contains no mention that any such right or easement existed for its benefit. It is more probable that the intention at the time of the grant to the defendant was to keep the lot open, to be used in connection with the schoolhouse, either as a playground or otherwise. This supposition will account for the insertion of the clause in the deed."

Where the owners of adjoining lots are bound by a covenant in a deed, under which both hold, not to erect buildings within a prescribed distance of the street upon which the lots abut, either is entitled to an injunction to enforce observance of the covenant by the other. *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53 (1900).

Where a number of owners enter into an agreement restricting the use to be made of their land, such agreement does not apply to a parcel of land not at the time comprehended within its terms, but acquired by one of the parties to the agreement subsequent to its execution. *Goodhue v. Cameron*, 142 N. Y. App. Div. 470, 127 N. Y. Supp. 120 (1911).

§ 335. Against all taking land with notice of restrictions.

Although an agreement between owners of land, restricting the use thereof, is not a covenant running with the land or a legal exception or reservation out of it, but simply a personal contract, equity treats it, if valid, as one which goes with the land into the hands of a purchaser with notice, who did not buy innocently or in good faith, and he will be required to observe such restrictive agreement. *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81 (1891), reversing 14 N. Y. Supp. 362.

On this question the court said: "Nor is there any difficulty in the fact that the agreement is by parol and purely personal. If just grounds of equitable jurisdiction exist, any valid contract, however unsolemn, may be enforced by a decree of specific performance. The cases are very numerous in which agreements purely personal not to engage in a particular trade or business within certain reasonable boundaries, have been enforced by injunction, and it certainly does not lessen the duty or imperil the rights that the contract proved or established is by parol."

A purchaser who takes a conveyance of land with notice of a covenant or agreement respecting it, is bound by the terms thereof, although it is not one which runs with the land. *Frye v. Partridge*, 82 Ill. 267 (1876); *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 286, 1077, 36 L. R. A. 393 (1895); *Stevens v. Annex Realty Co.*, 173 Mo. 511, 73 S. W. 505 (1903); *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111 (1907); *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 90 (1890); *Maurer v. Friedman*, 125 N. Y. App. Div. 754, 110 N. Y. Supp. 320 (1908); *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 388 (1892); *Smith v. Graham*, 147 N. Y. Supp. 773 (1914).

The rule that equity will enforce observance of restrictions imposed upon land against those taking such property with notice thereof has been held to be confined to application to covenants restricting the mode of using the land. *Merchants' Union Trust Co. v. New Philadelphia Graphite Co.*, ... Del. Ch. ..., 83 Atl. 520 (1912).

Where a covenant on the part of a grantor relative to restrictions to be inserted in deeds of adjoining lots was part

of the consideration for the grantee's deed and was intended to impose a burden on all lots for the benefit of all, equity will enforce the observance of such restrictions, not only by the grantor, but also by all subsequent purchasers with notice of the covenant, *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982 (1912), although it does not run with the land and is not binding at law. *Hayes v. Waverly & Passaic R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648 (1893).

To warrant equitable relief for the violation of such an agreement it is not essential that it should be binding at law, or that any privity of estate should exist between the parties, nor is it an objection that the contract is by parol. *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81 (1891), reversing 14 N. Y. Supp. 362.

"It is an important rule of equity, that a party taking with notice of an equity, takes subject to that equity. The meaning of this doctrine is, that if a person acquiring property has, at the time of acquisition, notice of a prior equity binding the owner in respect of that property, he shall be assumed to have contracted for that only which the owner could honestly transfer, viz., his interest, subject to the equity as it existed at the date of the notice." *Bricker v. Grover*, 30 Leg. Int. (Pa.) 380, 10 Phila. (1873).

It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform. *Whitney v. Union R. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858); *San Domingo Gold Min. Co. v. Grand Pacific Gold Min. Co.*, 10 Cal. App. 415, 102 Pac. 548 (1909). "The question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendors, and with notice of which he purchased." *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206 (1873).

The equity thus enforced arises from the inference that the covenant has, to a material extent, entered into the consideration of the purchase, and that it would be unjust to the original grantor to permit the covenant to be violated. *De*

Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. (5 Dick.) 329, 24 Atl. 388 (1892).

It was said by Justice Bigelow, in delivering the opinion of the court, in *Whitney v. Union R. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858): "This rests on the principle that, as in equity that which is agreed to be done shall be considered as performed. A purchaser of land, with notice of a right or interest in it subsisting in another, is liable to the same extent and in the same manner as the person from whom he made the purchase, and is bound to do that which his vendor had agreed to perform. Therefore an agreement or covenant, though merely personal in its nature, and not purporting to bind assignees, will nevertheless be enforced against them, unless they have a higher and better equity as *bona fide* purchasers without notice. It is on this ground that a purchaser of an estate, taking it with notice of a prior agreement by the vendor to sell it to another, can be compelled in equity to convey it according to such agreement. In like manner by taking an estate from a grantor with notice of valid agreements made by him with the former owner of the property, concerning the mode of occupation and use of the estate granted, the purchaser is bound in equity to fulfill such agreements with the original owner, because it would be unconscientious and inequitable for him to set aside and disregard the legal and valid acts and agreements of his vendor in regard to the estate of which he had notice when he became its purchaser."

The exact extent to which this doctrine will be carried where a covenant has been made by the owner of land, the burden of which does not at law run with the land, does not appear to be positively settled. If, however, the covenant be one respecting the land, and not purely collateral, there appears to be no reason why the doctrine of notice should not apply, or why the assignee of the land, knowing that the covenant has modified his assignee's ownership, should not be presumed to have contracted for it, subject to that modification. It is the doctrine of equity, that whatsoever is the agreement concerning any subject, real or personal, though in form and construction purely personal, and sueable only at law,

yet in equity it binds the conscience, as against the party himself, and any claiming under him, voluntarily or with notice.

The vital question in these cases is not whether there is a covenant running with the land, but whether the restriction was imposed on the servient estate for the benefit of the land in behalf of which it is sought to be enforced. Whether the restriction was so imposed or was merely a personal covenant for the benefit of the vendor, is to be determined, generally, by the bare interpretation of the grant or reservation creating it, aided, if necessary, by reference to the situation of the property and the surrounding circumstances. The great majority of cases wherein these principles are applied are those where a tract or estate is sold in lots or parcels, and covenants are exacted from the several purchasers imposing restrictions upon the use of the lots sold in pursuance of a general plan for the mutual advantage of all the parcels. In such cases, the restrictive covenants entered into between the first purchasers and their common grantor may be enforced by the purchasers or their assigns, without regard to the priority of title between the parties. In England the rule is well established that a court of equity will only enforce negative covenants and agreements, and will not enforce covenants to do positive acts relating to land or requiring the expenditure of money, thus drawing the line as to the enforcement of these restrictions as it would run were the rights created by them considered as easements. But in the United States equity has lent its aid to enforce agreements to do positive acts. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912), citing 5 Am. & Eng. Ency. of Law, pp. 9, 10, 11, 12, 13, 14, 15.

The question, whether the covenant runs with the land, seems to be material only on the question of notice; if the covenant runs with the land then it binds the owner of the land, whether he had knowledge of it or not; for he takes no greater title than his predecessor had to convey. If the covenant does not run with the land, but the land is subject to what is sometimes called an equity and other times a negative easement in favor of adjoining land, then in order to enforce this easement against the land, it is essential that the

owner should have taken the land with notice of it. *Hisey v. Eastminster Presbyterian Church*, 130 Mo. App. 566, 109 S. W. 60 (1908).

It matters not in equity whether a restrictive covenant runs with the land. If it is a reasonable restriction, not opposed to public policy, equity will enforce it. *Stines v. Dorman*, 25 Ohio St. 580 (1874).

While there are personal covenants enforceable in equity, it does not follow that all personal covenants are thus enforceable, merely because they have some relation to land. To give them this effect would put them on the same plane as those which run with the land. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 Pac. 677 (1911). Thus restrictions cannot be enforced against one who has no notice thereof. As we have seen, in certain instances he has constructive notice whether he has actual knowledge or not, as where the covenant is one which runs with the land, or where it appears in the chain of title to the premises. But where there is no constructive notice he must have actual notice, for, as has been said, to bind people with covenants not called to their attention and to draw the inference of an intention to enter into indiscriminate covenants, is too strong an inference for any court to draw. *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. Rep. 11.

The right to sue in equity arises not from notice, but by reason of the covenant attaching to the equitable interest in the land. It is the possession of the legal estate without notice by a purchaser for value that enables him to plead an effectual legal bar to the equitable right to enforce the equitable covenant. *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. Rep. 11.

In order that the purchaser of land may be bound by restrictions imposed thereon, which do not appear in his deed or in the deeds of his predecessors in title, but which were imposed on other lots by a former owner of his land, it must be shown that he bought the premises with notice of the restriction, and also that none of his predecessors in title since the restriction existed bought without notice of them so as to convey a title free from restriction. If any of his

predecessors did purchase without notice, that caused a break in the continuity of notice, which released the land from the burden of the restriction. *Roak v. Davis*, 134 Mass. 481, 80 N. E. 690 (1907).

One having no notice that a lot of ground is subject in any way to restrictions, and the same do not appear in the chain of title thereto, takes the same by purchase free from such restrictions. *Schermerhorn v. Bedell*, 163 N. Y. App. Div. 445, 148 N. Y. Supp. 896 (1914).

§ 336. Same subject.

In the leading English case on this subject, viz., the case of *Tulk v. Moxhay*, 2 Phill. Ch. 774 (1848), which has been very generally followed in this country, it appeared that in 1808 plaintiff sold a portion of his land described as "Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the center thereof, and the iron railing and stone work round the same," to one Elms in fee, and in the deed of conveyance Elms covenanted for himself, his heirs and assigns, with the plaintiff, his heirs, etc., that the former should and would, from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys, at their own expense, and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground. Such land passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with the vendor, but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he

saw fit, to build upon it, the plaintiff, who still remained owner of several houses in the square, filed a bill for an injunction to restrain the violation of the covenant in question.

Injunction was issued, the court holding that such covenant would be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law. In this respect it was said by the court: "Here there is no question about the contract; the owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retained worth less. It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

§ 337. — illustrative cases.

The owner of the north half and the owner of the south

half of a lot entered into an agreement not to permit the sale of intoxicating liquors on the south half of the lot, nor to convey the same without inserting a restrictive clause to that effect in the deed. The agreement was made upon sufficient consideration and duly recorded. Held, while not a covenant running with the land, to be enforceable in equity against a subsequent purchaser of the south half taking with notice of the agreement under a deed without the restrictive clause. *Sullivan v. Kohlenberg*, 31 Ind. App. 215, 67 N. E. 541 (1903).

In this case the court said: "The agreement in question is not a covenant which runs with the land. There was no privity of estate between the parties to the agreement, the covenantee had no interest in the land upon which the covenant imposed a burden, no interest or estate was granted, and the acts which it was agreed should be done did not concern any interest or estate granted or conveyed. But the contract in question is a restrictive agreement as to the use of the property, which may be enforced upon equitable grounds in favor of the lot designed to be benefited by the restriction. And it may be enforced against any owner of the lot, subject to the burden of the restriction, who took it with notice. When Weigel entered into the agreement he attached to that part of the lot owned by him an equity in favor of the appellee as soon as he became the owner of the other part of the lot. Appellee purchased the lot, relying upon the agreement made by Weigel, which was a valid agreement and certainly binding upon Weigel. Equity would have restrained him from selling liquor upon the lot, and appellant, having purchased the lot with notice of the equity, does not stand in any different situation from the party from whom he purchased. As the agreement was intended to affect the use of the property in the hands of a grantor by inserting in the deed a restriction upon its use, it cannot be said to be a purely personal contract, but goes with the land into the hands of a purchaser with notice of the agreement."

The following agreement was entered into by adjoining property owners: "This agreement made this fourteenth day of February, 1901, between Alonzo Cotton, of Ocean City, County of Cape May, State of New Jersey, of the first part,

and Gainer P. Moore, of the same city, county and state, of the second part, is as follows, to wit: That we, the parties of the first part and second part, owning properties adjoining each other on the east side of Asbury avenue below Eighth street, being lots numbers 438 and 440, enter into a mutual agreement, that the said party of the first part may build up to the party line fifty feet of the distance from the property line on Asbury avenue, and that the said party of the second part may build up to the party line fifty from the property line of the street back, that is to say, that each party can use the line one-half the distance from street to street, which is one hundred feet, provided, he let no part of the building hang over the line; and it is further agreed that if either party desires to erect a building extending more than fifty feet from the property line on either street, he shall not build it nearer the party line than three feet. For the true and faithful performance of all of which, we set our hands and seals the day and year aforementioned." The defendants subsequently acquired title to lot number 438 with actual notice of the agreement. The complainant had long since built upon his lot and conformed to the lines specified in the covenant. The defendants commenced to build on their lot in disregard of the agreement and proposed to build on the division line to which the complainant's building extended, and thus shut off the light and air which the complainant enjoyed through apertures in his building. It was contended on the part of defendant that the covenant in question did not run with the land nor create an easement, but was purely personal, and, therefore, not enforceable. The court, however, held that the agreement was enforceable against defendants because they took with notice thereof, although the covenant was not one running with the land. In this respect it was said: "The covenant under consideration in the case at bar was intended by the parties to it, as I read it, to be effectual and binding by way of building restriction on their adjoining premises, and upon their successors in title. For years it was so acted upon. True, it could not bind the alienees of either party without notice of its existence, but as actual notice is

present in this case, I think the agreement enforceable." *Cotton v. Cresse*, 80 N. J. Eq. 540, 85 Atl. 600 (1912).

A covenant restricting the premises in question to use for dwelling purposes only will be enforced against one purchasing from the grantee with notice thereof, unless it is established beyond possibility of a doubt that the remainder of the land will not be damaged by its violation. *Cornish v. Weissman*, 56 N. J. Eq. 610, 35 Atl. 408 (1896).

The owner of adjoining lots sold one and covenanted in the deed for himself, his heirs, executors, administrators and assigns, with the grantee, his heirs, executors, administrators and assigns, that he would not erect or cause to be erected on the remaining lot "any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance." The grantor subsequently conveyed his remaining lot without mention of the covenant and without restriction, and it was used for the purpose of a livery stable in such a way as to constitute a nuisance. Held, that the covenant was merely personal, and solely against the acts of the defendant (the grantor); that it did not make him liable for the acts of his grantee, and consequently there existed no cause of action against him. *Clark v. Devoe*, 124 N. Y. 120, 26 N. E. 275 (1891).

Here the court said: "While effect should be given to every word of a written instrument, if possible, it is necessary sometimes to reject a part as surplusage, and it is never allowable in order to prevent that or to effect any other result, to insert that which the parties did not agree to. A personal covenant binds the heirs, executors and administrators in respect to assets, so that the word 'assigns' only need be rejected as surplusage, in order to relieve the case of all difficulty. A strained construction that has no foundation to rest upon except the single word 'assigns,' used in the descriptive and unsubstantial way already mentioned, should not be resorted to when it involves a serious result to the grantor with but slight benefit to the grantee, because it is improbable that under such circumstances such a result was intended. Hence only by the use of plain and direct language of the grantor,

should it be held that he created a right in the nature of an easement and attached it to one parcel as the dominant estate and made the other servient thereto for all time to come. We think that the language used by the parties permits no such result. We agree with the learned General Term that the construction contended for by the plaintiff 'would be giving a scope to the covenant far beyond what the language used requires and beyond what the grantee of lot number 22 had a right to assume in accepting a conveyance of that lot. An incumbrance affecting lot number 22 for the sole benefit of lot number 24, and in a conveyance of lot number 24 into which a purchaser would hardly look for incumbrances upon lot number 22, will not be inferred by a forced construction of the covenant or any amplification of its language beyond its natural meaning.' "

One Gollner was a builder of flats and tenement houses, and contracted for the purchase of a lot fronting on a street in the rear of plaintiff's residence for the purpose of erecting a flat or tenement house. The street in question was occupied by residences of a superior character and the contemplated structure would be an injury to the neighboring premises. Certain owners in the vicinity tried to induce Gollner to refrain from erecting such a building, but failing therein, and for the sole and declared purpose of saving the neighborhood from flats, purchased Gollner's lot from him at a profit to him of six thousand dollars, and the latter agreed "that he would not construct any flats in plaintiff's immediate neighborhood or trouble him any more." Soon thereafter, however, Gollner purchased other land in the neighborhood and commenced the erection of a flat building thereon, and upon being threatened with suit he conveyed the premises to another in exchange for other property of comparatively small value, and then as the agent of the purchaser continued the construction of the building. The purchaser took the premises with full notice of all the facts and for the purpose of aiding and protecting Gollner in his efforts to avoid his contract. Held, that Gollner would be restrained from erecting the building in question, and from the use of any structure on the premises

as a flat. *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81 (1891), reversing 14 N. Y. Supp. 362.

In this case the court said: "There is, therefore, no reasonable doubt that if Gollner was still the owner of the land and engaged in constructing the flats his enterprise could be restrained by injunction. No other remedy would have the dimensions or proportions of the contract purpose. Money damages could not be an accurate substitute and would merely palliate and not redress the injury. It would be a continuing one whose full and actual effect would scarcely be foreseen, and which the plaintiff could only escape by breaking up his home and retreating to some possible locality in which tenements were not and their builders did not afflict. . . . The moment he bought or leased any such land, he came under an obligation not to use it in a particular way; the land in his hands necessarily became restricted and limited in the use of which it was capable; and as much so, though bought of another, as if it had come from the contractor, who imposed the restraint as vendor. I do not see why the equitable rights of the plaintiff did not attach to the land when bought, if it came, as it did, within the scope of the contract."

In a deed of conveyance the grantor, as part consideration for such conveyance, covenanted for himself, his heirs and assigns, in respect to an adjacent lot owned by him at the time, "that the only building put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purposes than that of a family residence, and shall cost not less than five thousand dollars for the residence alone." Held to be binding on the grantor and all persons claiming under him with notice of the same. *Brown v. Huber*, 80 Ohio St. 183, 88 N. E. 322 (1909).

"We think," said the court, "the rule upon this subject as clearly established by the authorities is, that when the action is in equity to enforce a restrictive covenant controlling the use or enjoyment of land, the vital question is not whether there is a covenant running with the land, but whether the restriction relied on, is one imposed upon the servient estate for the benefit of the land in behalf of which it is sought

to be enforced. And we apprehend the rule is the same, whether the restriction imposed is charged upon the land conveyed, or upon land retained by the grantor."

Defendant purchased two lots from plaintiff and at the time of their conveyance made a collateral agreement not to erect a stable on an adjoining lot. Subsequently defendant sold the adjoining lot to his son, who had notice of such agreement. It was held that the son would be enjoined from erecting a stable thereon, and that it was not necessary that the covenant run with the land. *Bricker v. Grover*, 30 Leg. Int. (Pa.) 380, 10 Phila. 91 (1873).

The owner of a block in a town set it apart and designated that it should be used for residence property exclusively, and deeded several lots to W, in which deed it was provided that the lots should not be used as a feed or wagon yard. Thereafter he conveyed several other of the lots to L without restriction on their use, but L had notice at the time of his purchase that the block was dedicated to residence purposes only and agreed with the vendor not to establish a wagon or feed yard on said lots. Thereafter W built a residence on his lot and made his home there. It was held that under this state of facts an injunction would issue restraining L from establishing a feed and wagon yard on his lots. *Lowrance v. Woods*, 54 Tex. Civ. App. 233, 118 S. W. 551 (1909).

A covenant "not to run or permit to be run, any saloon in any building now owned by me on the same block, whether I continue to own said property, or sell or convey the same to other parties, for a period of five years," is enforceable against a subsequent purchaser of a portion of such property, although considered as merely a personal covenant, and not one running with the land. *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911 (1898).

The owner of a tract of three hundred and sixty-eight acres at a railway junction, sold five and one-half acres with the exclusive mercantile privileges at, in and around the junction, including the exclusive right to sell goods, wares and merchandise; to keep houses of public entertainment and refreshment; to establish and erect warehouses, factories, foundries and shops on the entire three hundred and sixty-

eight acre tract. The deed provided that these covenants should apply to grantor's heirs or assigns, and should run with the land conveyed to whomsoever it might be devised or conveyed. Held, that these covenants do not run with the land, but are merely personal, binding only the grantor. "They are not covenants which can be held to be of such a nature as to impress themselves on the land burdened, for the benefit of some other property; they are covenants collateral to the land merely—personal covenants which cannot be annexed to the land." *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676 (1886).

A was the owner in fee of a plot of vacant ground, and also of a house on adjoining land. He sold the house to one D, and covenanted for himself and his heirs and assigns, with D, his heirs and assigns, that no building whatever should ever at any time thereafter be erected on the vacant land. Thereafter he sold the vacant land to M in fee, but took a covenant from him in the terms of that which he himself had entered into with D. Through divers mesne conveyances, the house became vested in X in fee, and the vacant land, after one mesne conveyance, became vested in Y in fee. Y, before the land was conveyed to him, had notice of the restrictive covenant, but notwithstanding that, he began to build upon the land. It was held that he would be restrained from erecting such building. *Mann v. Stephens*, 15 Sim. 377, 10 Jur. (O. S.) 650 (1846).

§ 338. Restrictive covenants that run with the land.

Under the feudal system the transfer of every estate created privity of tenure between the parties, and hence both the burden and the benefit of all covenants made by either bound and profited the assignee of either as an incident to the land. But when the statute of *quia emptores* abolished subinfeudation this privity no longer existed in cases where a fee was transferred and no reversion was left in the donor, and it became a rule that covenants which imposed any charge, burden, or obligation upon the land were held not to be incident to it, and therefore incapable of passing with it to an assignee. But if the covenant were one intended to benefit

the land, it was considered to be incident to and run with the land, and therefore whoever might become the owner of the land would also become entitled to the benefit of the covenant. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 Pac. 677 (1911).

A restrictive covenant runs with the land as the necessary result of the relation of the parties who make the covenant at the time it is made, and because the parties making the covenant have interests in the land which are the subject of it. The contracting parties may, by the express terms of their contract, provide that the covenant shall not run with the land, although if nothing was said about it, it would so run; but however clearly and strongly expressed may be the intent and agreement of the parties that the covenant shall run with the land, yet if it be of such a character that the law does not permit to be attached, it cannot be attached by the agreement of the parties, and the assignee will take the estate clear of any such covenant. *Wilmurt v. McGrane*, 16 N. Y. App. Div. 412, 45 N. Y. Supp. 32 (1897).

"In order that it may run with land, its performance or non-performance must affect the nature, quality or value of the property demised independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be privity between the contracting parties." *Hisey v. Eastminster Presbyterian Church*, 130 Mo. App. 566, 109 S. W. 60 (1908).

Such covenants and such only, run with land, as concern the land itself, in whosoever hands it may be, and become united with and form part of, the consideration for which the land or some interest in it is parted with, between the covenantor and covenantee. *Lydick v. Baltimore & O. R. Co.*, 17 W. Va. 427 (1880), citing 2 Washburn, Real Property, p. 263.

"All covenants which relate to land and are for its benefit run with it, and may be enforced by each successive assignee into whose hands it may run by conveyance or assignment." *Brockmeyer v. Sanitary District*, 118 Ill. App. 49 (1905).

A covenant is said to run with land when either the liability to perform it or the right to take advantage of it passes

to the assignee of the land. *Sjoblom v. Mark*, 103 Minn. 193, 114 N. W. 746 (1908).

A vendor of land may restrict its use in any particular way, provided such restrictions are not against public policy, and a covenant of this character runs with the land when either the liability to perform it or the right to enforce it passes to the assignee or vendee of the land if he has notice of the covenant. *Stevens v. Annex Realty Co.*, 173 Mo. 511, 73 S. W. 505 (1903).

A covenant contained in a deed which limits the use of the land conveyed is enforceable in equity although it is not one of a class technically running with the land. *Woods v. Lowrance*, 49 Tex. Civ. App. 542, 109 S. W. 418 (1908).

Where a restrictive covenant is appurtenant to the land, the right to enforce it in equity passes with the land. *Boyd v. Roberts*, 131 Wis. 659, 111 N. W. 701 (1907).

The rule is well established that when the covenant extends to a thing in esse, parcel of the demise, annexed and appurtenant to the thing demised, it shall go with the land and shall bind the assignee, although he be not bound by express words, but when the covenant extends to a thing which is not in being at the time of the demise, it cannot be appurtenant or annexed to the thing which has no being. *Sjoblom v. Mark*, 103 Minn. 193, 114 N. W. 746 (1908).

When an instrument conveys or grants an interest or right in land, and at the same time contains the covenant in which the right attached to the estate or interest granted is reserved, or when the grantee covenants that he will do some act on the estate, or interest granted, which will be beneficial to the grantor even as respects the remaining interest in the lands out of which an interest is granted, or lands adjacent thereto, such covenant is one which may become annexed to and run with the land and bind its owners successively. When such grant is made and contains a covenant so expressed as to show that it was reasonably the intent that it should be continuing, it will be construed as a covenant running with the land. A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must

concern the interest created or conveyed. *Brockmeyer v. Sanitary District*, 118 Ill. App. 49 (1905).

It has been declared to be a well settled principle of law that no covenant in regard to real estate will run with the land unless the obligee in the covenant has some interest in the land to which the covenant can be attached, and with the conveyance of which it will pass. "Unless such obligee has an interest in the premises which he can convey, the mere making of the covenant, which so far as he is concerned is entirely collateral to the ownership of the premises, will create no right in him as against a grantee of the premises over which the easement is created by the covenant." *Wilmurt v. McGrane*, 16 N. Y. App. Div. 412, 45 N. Y. Supp. 32 (1897).

Where a covenant creates no interest in the land conveyed, but simply deals with its use, it is not a covenant running with the land. *Sjoblom v. Mark*, 103 Minn. 193, 114 N. W. 746 (1908).

A covenant that confers an immediate, permanent and beneficial effect on the use to which the real estate is designed to be applied, will run with the title. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190 (1890).

A parol agreement, whatever its character, cannot at law run with land. But if it is of such a character, that it would, if it were a covenant, run with the land, be a covenant real, such parol contract will be regarded by a court of equity as running with the land, and it will at the instance of the party who owns the land and has acquired it from the covenantee, whether he hold the legal or equitable title, enforce specifically such contract. *Lydick v. Baltimore & O. R. Co.*, 17 W. Va. 427 (1880).

When the benefit of a restrictive covenant has once been clearly annexed to a piece of land, the presumption is, unless there is something to rebut it, that it passes by assignment of that land, and runs with it, as well in contemplation of equity as of law, without proof of special bargain or representation on the assignment. It runs with the land because the purchaser has bought something which inhered in or was annexed to the land bought, and his ignorance of the existence of such

a restriction does not defeat the presumption. *Rogers v. Hosegood*, (1900) 2 Ch. 388, 83 L. T. Rep. 186, 16 T. L. Rep. 489, 69 L. J. Ch. 652, 48 Wkly. Rep. 659.

§ 339. — illustrative cases.

The owner of land conveyed a tract adjoining that on which he owned a public warehouse, and took from the grantee a special bond with a covenant not to allow or permit a warehouse or place of shipping or receiving goods on the conveyed premises. Held, that this was a covenant running with the land, and might be enforced by the covenantee, his personal representatives, heirs or assigns, against the covenantor, his heirs, and purchasers with notice of the covenant. *Robbins v. Webb*, 68 Ala. 393 (1880).

A covenant entered into between owners of property abutting on a city street in which they agreed to add four feet to the sidewalk space in front of their lots and not to erect buildings thereon, ran with the land into whosoever's hands the title came. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

Where the owner of a tract of land subdivided the same and conveyed the lots subject to a uniform building restriction, such covenant ran with the land, and was mutual, inuring to the benefit of all the purchasers. *Highland Realty Co. v. Groves*, 130 Ky. 374, 113 S. W. 420 (1908).

A restriction in a deed that "no intoxicating liquors are to be sold on the premises in less quantities than five gallons," which was inserted because the grantor's store and dwelling house were near, runs with the land. *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410 (1887).

The conveyance of various parcels out of a tract of land subject to restrictive covenants relative to the location of buildings to be erected thereon, creates a covenant running with the land, being for the benefit of all of the lots, and the owner of one parcel may recover damages for its violation by another owner of a parcel. *Leader v. La Flamme*, ... Me. ..., 88 Atl. 859 (1913).

An agreement made by the owner of land with an adjoining

ing owner that he would not sell or permit to be sold on his premises, for a period of ten years, any intoxicating liquor, does not constitute a covenant running with the land. *Sjoberg v. Mark*, 103 Minn. 193, 114 N. W. 746 (1908).

A restrictive covenant prohibiting the erection of apartment houses on land conveyed and contained in deeds to such land, are equitable easements which run with the land. *Miller v. Klein*, ... Mo. App. ..., 160 S. W. 562 (1913).

An agreement under seal, made subsequent to the conveyance of a lot, containing certain restrictions as to the use of such lot and as to the conveyance of other lots by the vendor on the same street, does not create an easement nor run with the land. *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206 (1873).

The owner of two adjoining lots conveyed one of them subject to a restriction providing that any building erected thereon should be at a depth of sixty-five feet. Subsequently he conveyed the other lot with a like restriction. Held, that the easement created in favor of the first lot was one running with the land and passed as an incident of the fee to subsequent grantees. It was further held that the fact that the easements in question were not mutual was immaterial. *Davis v. McCarthy*, 131 N. Y. App. Div. 755, 116 N. Y. Supp. 149 (1909).

Where the owner of land conveyed a portion thereof and in the deed both he and the grantee covenanted for themselves, their heirs and assigns, not to erect a building on the premises conveyed or the land retained by the grantor within ten feet of the street line. Held, that the covenant was one running with the land. *Francis v. Ziering*, 128 N. Y. App. Div. 253, 112 N. Y. Supp. 647 (1908).

The owner of land in the residence portion of a city conveyed a part of her property and covenanted in the deed that whenever she, or her heirs or assigns, should improve the remaining portion, that the improvements should consist in the erection of one or more first class dwelling houses, the front of which should be placed a certain distance back from the building line. Held, that such covenant was one running with the land, and bound all subsequent grantees taking with notice. *Holt v. Fleischman*, 75 N. Y. App. Div. 593, 78 N. Y.

Supp. 647 (1902), reversing 37 N. Y. Misc. 172, 74 N. Y. Supp. 894.

A restrictive covenant that, "this agreement is made upon the express agreement by and between the above named parties, that no intoxicating liquors of any kind shall ever be sold upon the above described premises," is a covenant running with the land and enforceable against subsequent grantees, although the deeds to them contained no clause referring to the restrictive covenant. It was further held that even although the covenant should be construed as a simple contract only, the grantees had record notice thereof and were bound by it, and that it was enforceable against them. *Spencer v. Stevens*, 18 N. Y. Misc. 112, 41 N. Y. Supp. 39 (1896).

A deed of conveyance of land to the grantee, his heirs and assigns, together with a right of way or an easement in a strip used as a lane, contained a restriction that "said lane not to be incumbered or built upon by either party." Held, to be a covenant running with the land, and that the words "either party" were not used in a restricted sense, but as including all persons whom the party undertook to represent and bind with himself; that is, his "heirs and assigns," and to be binding on subsequent purchasers against whom it could be enforced by the person in whom vested the right of easement. *Dexter v. Beard*, 130 N. Y. 549, 29 N. E. 983 (1892).

"Had the words 'either party,' " said the court, "been omitted, it would not have been contended but that the covenant bound all subsequent grantees. And their use cannot be held to have been intended to limit the duration of the covenant to such a period as the grantor and grantee should severally remain the owners of the dominant and servient estates, for they were undoubtedly employed, not in a restricted sense, but broadly, so as to include by the word 'party' all persons whom the party undertook to represent and bind with himself."

A covenant between owners of adjoining lots, agreeing for themselves and all claiming under them, specifying that all buildings erected on such lots should be a certain distance from the front street line, is one that runs with the land, and

the grantee of one of the lots cannot remove it, except by the consent of all the interested persons. *Roberts v. Levy*, 3 Abb. Pr. (N. S.) (N. Y.) 311 (1867).

A covenant by a grantee against establishing on the granted premises any manufactory, trade, business or calling which might be "in any wise dangerous or noxious or offensive to the neighboring inhabitants," runs with the land. *Brouwer v. Jones*, 23 Barb. (N. Y.) 153 (1856).

A covenant in a deed of conveyance against nuisances and the erection of steam engines on premises, runs with the land, and it is unnecessary to insert it in subsequent conveyances in order to bind subsequent grantees. *Birdsall v. Tiemann*, 12 How. Pr. (N. Y.) 551 (1855).

Where the lessor of a mill site on a stream covenanted not to let or establish any other site on the same stream to be used for sawing mahogany, the covenant was held to run with the land, and that for a breach an action could be maintained by the assignee of the covenant. *Norman v. Wells*, 17 Wend. (N. Y.) 136 (1837).

A restrictive covenant in a deed not to carry on or permit on the premises "any livery stable, slaughter-house, or any other manufactory, trade or business whatsoever, which should or might be in any wise offensive to the neighboring inhabitants," is one running with the land. *Barron v. Richard*, 3 Edw. Ch. (N. Y.) 96 (1837).

A covenant on the part of a grantor not to erect a building on his land in front of that granted, runs with the land, and passes to an assignee without any separate assignment of the covenant. *Watertown v. Cowen*, 4 Paige Ch. (N. Y.) 510, 27 Am. Dec. 80 (1834).

M purchased a plot of ground in a village, and at the same time, in accordance with an agreement with the vendor, took a bond from the vendor to guarantee that a triangular piece of land belonging to the vendor and located on the opposite side of the street should never be built upon. His deed and the agreement were duly proved and recorded at the same time. Thereafter M sold his plot of ground to one H, and informed him of the privilege secured by the bond. It was

held that H was entitled to the benefit of the agreement, and that M could not, without his consent, be permitted to make a new arrangement with the holders of the legal estate in the triangular piece of land by which buildings should be erected thereon. *Hill v. Miller*, 3 Paige 254, 24 Am. Dec. 218 (1832).

It was covenanted between the parties in deeds of conveyance to a number of contiguous lots that none of them should "be used for purposes other than a dwelling house, office, privy, coach-house or stable, the restriction to cease only when the lot should be built on according to the spirit of the agreement." Held, to be a covenant running with the land which bound the successors of the parties. *St. Andrew's Church's Appeal*, 67 Pa. St. 512 (1871).

Where in a deed of conveyance of land the grantee agrees not to sell liquors on the premises, such covenant runs with the land and is binding on assignees of the grantee, although no mention of assignees is made in the covenant. *Snyder's License*, 2 Pa. Dist. 785 (1893).

A restriction in a deed to a lot against the erection of any building on a certain portion of the land conveyed, and against any building erected on any part of the lot having a window overlooking the adjoining lot belonging to the grantor, his heirs or assigns, "at any time hereafter forever," is a covenant running with the land. *Hansell v. Downing*, 17 Pa. Super. Ct. 235 (1901).

Where land was conveyed to a university for a campus, and on condition that it should be used exclusively for that purpose, and that no buildings should be erected thereon except those devoted to university purposes, such condition was one running with the land. *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262 (1901).

The owners of a tract of land devised a portion thereof and in the lease the lessee covenanted for himself and his assigns to observe a certain building line, and the lessors covenanted for themselves and their assigns "not to erect or permit to be erected on the adjoining land of the grantors any building projecting beyond the said building line." The

lessee erected a house on his land and assigned his lease to another. The lessors contracted with T to erect a house on their remaining adjoining land, to observe the building line in question, and upon the completion of the house they agreed to grant a lease to T. T erected a house thereon which projected about four feet over the building line, and the grantors expressed their intention of granting him a lease. It was held that the covenant touched and concerned the thing demised and ran with the land, and that the grantors were liable in damages to the assignee of the original lessee. *Ricketts v. Churchwardens of Enfield*, 100 L. T. Rep. 362, (1909) 1 Ch. 544.

It was held that a covenant on the part of a lessee to use the demised premises as a private dwelling house only, was a covenant running with the land, although the word "assigns" was not used. *Wilkinson v. Rogers*, 10 Jur. (N. S.) 5 (1864).

A covenant against building, entered into by a purchaser of land with the vendor, who also owns adjoining lands, his heirs and assigns, is a covenant running with the land. *Western v. Macdermot*, L. R. 1 Eq. 499 (1866), affirmed in L. R. 2 Ch. 72, 15 L. T. Rep. 641, 36 L. J. Ch. 76, 12 Jur. (N. S.) 366, 15 Wkly. Rep. 265 (1867).

It has been held that a covenant on the part of a grantee of land, not naming his assigns, that no building erected on the land should be used as a beer shop, does not run with the land. *Wilson v. Hart*, L. R. 1 Ch. App. 461 (1866).

§ 340. — materiality of question.

In regard to restrictive covenants, the question whether they run with the land, seems to be material in equity only on the question of notice. If it runs with the land, it binds the owner of the land without regard to whether or not he had knowledge of it, for he takes no greater title than his predecessor had to convey. If it does not run with the land, but the land is subject to an equity or negative easement in favor of the adjoining land, then, in order to enforce the easement against the land, it is essential that the owner should have taken with notice of it. *Coughlin v. Barker*, 46 Mo. App. 54 (1891).

§ 341. — how determined.

The test by which to determine whether a covenant in a deed runs with the land is the intention of the parties. To ascertain this intention, resort must be had to the words of the covenant, read in the light of the surroundings of the parties, and the object of the grant. *Landell v. Hamilton*, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227 (1896); *McCloskey v. Kirk*, ... Pa. St. ..., 90 Atl. 73 (1914).

Whether a covenant creates an easement or is only a personal covenant should be determined by a fair interpretation of the grant or reservation creating the right. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 Pac. 677 (1911).

In determining whether the easement is personal to the grantor or one that runs with the land, the fair interpretation of the grant or reservation creating it must be considered, aided if necessary, by the situation of the land relative to other land of the grantor. *Peck v. Conway*, 119 Mass. 546 (1876).

“Whenever it fairly appears from the words of the grant that it was the intention of the parties to preserve a right in the nature of an equitable servitude in the property granted for the benefit of other land owned by the grantor and embraced within the same tract as the parcel granted, such servitude becomes appurtenant to the land of the grantor, and the burden thus created will pass to and be binding upon subsequent grantees of different portions of such tract.” *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701 (1907).

A owned a large lot of land, and conveyed a triangular strip of it to B, with the restriction that “no building is to be erected by the said B, his heirs or assigns, upon the land herein conveyed.” The remainder of the lot was retained by A as a homestead, and this was the only land he owned in this vicinity. Subsequently A sold his homestead to C, without mention in the deed of the restriction on the lot of B, or of privileges and appurtenances. B then sold his lot to D, and the deed made no reference to the restriction on the lot, and D had no knowledge of it. All the deeds were recorded. Held, that A and B intended to create an easement on the lot conveyed to B for the benefit of the remaining homestead

lot of A, and that the restriction passed as appurtenant to the lot to C, who could maintain a bill in equity to restrain D from violating it, although the violation threatened would do no appreciable damage to the lot of C. *Peck v. Conway*, 119 Mass. 546 (1876).

"It is difficult to see how he (A) would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect; this is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right, but was an easement appurtenant to the estate which was conveyed to the plaintiff."

§ 342. Personal restrictive covenants.

Covenants relating to a subject matter not *in esse* such as for the erection of buildings upon the premises demised, are personal covenants and do not run with the land so as to bind the assignees unless they are expressly named therein. *Hisey v. Eastminster Presbyterian Church*, 130 Mo. App. 566, 109 S. W. 60 (1908).

A mere personal covenant restricting the use of land may be for the benefit of the property owned by the persons who may enforce it, but that fact does not take it out of the category of personal covenants, and make of it an easement. *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 Pac. 677 (1911).

Privity of estate that can render parties liable on covenants not of their own making relate solely to covenants running with the land or some interest therein. *Evansville & S. I. Traction Co. v. Evansville Belt Railway Co.*, 44 Ind. App. 155, 87 N. E. 21 (1909).

As against the argument that a restriction is for the personal benefit of the grantor, it might be said that the only

situation under which the grantor could enjoy the benefits of the covenant is as owner of the land retained, and that he should be benefited by it from no other circumstance than from the circumstance that it benefited that land.

§ 343. — illustrative cases.

Where a gun club conveyed a portion of its land for the purpose of building lots only and imposed a restriction against the use of firearms thereon, such covenant was for its own benefit, and a subsequent purchaser of one of the building lots in such tract so conveyed had no such interest therein as gave him a right to restrain its breach. *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625 (1910).

A covenant in a lease of a lot on the part of the lessor that the lessee shall have the exclusive right to keep a store in the town for a period of ten years, is a mere personal covenant, and is not binding upon persons leasing other lots in the same town from the same owner, although they have notice thereof. Such a covenant does not run with the land, nor does it create any lien thereon, and upon a breach, the lessee's remedy is against the lessor for breach of contract. *Taylor v. Owen*, 2 Blackf. (Ind.) 301, 20 Am. Dec. 115 (1830).

A corporation leased a tract of land adjoining Baltimore city and at the time of the execution of the lease entered into an agreement with the lessor that the following by-laws or covenants should be fully complied with: "(1) No land to be sold or leased without a pledge to build speedily, design of buildings to be approved by directors. (2) Buildings to be twenty feet back of building line, and fronts to be ornamented with shrubbery and flowers. (3) No nuisances, factories, etc., to be permitted; clause in deed to this effect. (4) To regulate other proceedings." The lessor reserved from the lease a lot having a frontage of four hundred feet, and after his death the purchaser of such lot released the corporation from the restrictive by-laws, and the company also acquired the reversion in all of the land, thereby becoming the owner of the fee. It was held that the covenant requiring the speedy building of houses was intended to be for the

benefit of the lessor and of the company, and not for the benefit of other persons, and the company being now the owner of the lessor's reversionary interest, it had the power to extend the time for building as it might deem best. *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 286, 1077, 36 L. R. A. 393 (1895).

Land which was bounded on one side by a street and on the other by a railroad was conveyed "subject to the condition that no building shall ever be placed on that part of the same lying within twenty-five feet of said street." Held, that, in the absence of evidence that it was imposed for the benefit of other land, the restriction must be construed to be merely personal with the grantor, which his heirs could not enforce after his death. *Skinner v. Shepard*, 130 Mass. 180 (1881).

The mere fact that at the time the grantor conveyed the land, he was the owner of land separated from the estate granted by the railroad, was held not sufficient to show that the object of the restriction was to benefit this land. "In the absence of any words in the deed to this effect," said the court, "or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate."

The owner of land fronting on a street conveyed several lots with a restriction that buildings thereon should be erected thirty feet from the street. This was for the purpose of making it high-class residence property, but the deeds did not refer to any general plan, nor did they contain any reciprocal covenant. Soon thereafter the property became undesirable for residence purposes, owing to the construction of a cable railway in the street, and the owner conveyed other of his lots free of restrictions. Held, that the restrictions were imposed for the personal benefit of the grantor, and could not be enforced by owners of adjoining lots who had taken deeds with like restrictions, and had built accordingly. *Coughlin v. Barker*, 46 Mo. App. 54 (1891).

Where a deed from a common grantor did not bind him to perpetuate the restrictive covenant contained therein against

his grantee or his assigns or subsequent purchasers of other parts of his land, and it did not appear that the covenant was for the benefit of subsequent purchasers of any of his unsold lots, it was a purely personal covenant of the grantee to his grantor in such deed. *Sailer v. Podolski*, ... N. J. Eq. ..., 88 Atl. 967 (1913)

In this case the court said: "The covenants are in form purely personal covenants of the grantee to his grantors, restricting the manner in which the grantee should use the land granted. If these covenants were intended by the parties to embody stipulations which were not expressed, if they were intended by the parties to include by implication the stipulation that they were for the benefit of the purchasers of all or some particular portion of the unsold lots of the grantors, or were to be enforceable at the instance of subsequent grantees of remaining lots, the accurate ascertainment of that intention is clearly necessary to clothe the subsequent purchaser with the right of enforcement of the covenant."

The owner of three adjoining lots conveyed one of them with a provision in the deed "that no building or edifice of any description whatsoever exceeding eight feet in height shall at any time hereafter be erected within thirty-two feet of the rear line of the said two lots," which he retained. The provision was not coupled with any reservation of the condition in favor of the heirs or assigns of the grantor, and was not declared to be binding upon the heirs or assigns of the grantee. It was held that in the absence of any words giving a right of re-entry for a breach, the provision would be construed as a mere personal restriction for the benefit of the grantor, especially so in view of the history of the land and the purpose to which it had been devoted, which showed no necessity for the continuance of the restriction, and the subsequent deeds to the property contained no mention of the condition, and it appeared that the persons who subsequently owned the property regarded the restriction as obsolete. *Krekeler v. Aulbach*, 51 N. Y. App. Div. 591, 64 N. Y. Supp. 908 (1900), affirmed in 169 N. Y. 372, 62 N. E. 416 (1902).

Two hundred and eight of a total of two hundred and

fifty-three lots in a tract of land were conveyed with certain restrictions imposed upon their use. Twenty-one of the total number were conveyed without restrictions. Twenty-three were mortgaged and through foreclosure were conveyed without restrictions. There was no uniformity of location of the lots excepted from the restrictions, such as would evidence an intention to limit the application of the improvement scheme, if there was one, to any particular part of the tract, and the restrictive covenant was omitted too frequently from conveyances of lots to ascribe its omission to inadvertance. Held, that such covenant was merely personal between the parties to each deed, and could not be enforced by one grantee against another grantee. *Davidson v. Dunham*, 159 N. Y. App. Div. 207, 144 N. Y. Supp. 489 (1913).

A covenant made by the owner of land not to permit a grist mill to be erected thereon, is merely a personal contract, binding only the covenantors and their personal representatives. *Harsha v. Reid*, 45 N. Y. 415 (1871).

The owner of land agreed in writing, which agreement was duly acknowledged and recorded, to convey land, and to lend money to the grantee to build houses upon the land when it should be divided into lots, and in such agreement it was provided that the houses should be built ten feet back from the line of the street, referring to the houses to be built. Held, that as the restriction did not refer to any houses except those specifically mentioned in the agreement, the covenant was personal for the benefit of the grantor only, and that it was performed when the houses were built, the grantor's money repaid to him with interest, and his interest in the property had ceased, and that a subsequent owner of one of the lots could not maintain an injunction against the owner of another lot to restrain him from erecting a building nearer than ten feet to the street line. *Hutchison v. Thomas*, 190 Pa. St. 242, 42 Atl. 681 (1899).

The court said: "The manifest purpose of the agreement was to secure the development of the property in a manner which Laws (the grantor) considered best calculated to secure the purchase money and the advances he was about to make. It related to the houses then to be built, and contained no

covenant that thereafter houses should not be built on the ground in a manner other than that provided in the specifications, and not even a suggestion can be found in it that no house except of the kind specified shall ever be erected on the ground. The provision that the agreement should not be taken to be merged by the execution of the deed was simply a wise provision against a possible claim that all prior agreements were merged in the deed. Our conclusion is that the agreement was a builder's agreement merely; that the covenants were personal and for the benefit of the grantor only; that they were fully performed and the agreement at an end when the ground rent and mortgages were paid and the grantor's interest in the property ceased. Under this view of the agreement the appellant has no standing, and the injunction was properly refused."

§ 344. Notice must be had before purchase of land.

Where the restrictions as to the character of the buildings to be erected on property has been expressly inserted in deeds, and it is claimed that there are additional restrictions as to the character of the buildings created by parol, either by a general plan or otherwise, the evidence should be very clear, not only as to the existence of such restrictions, but that the purchasers had notice before payment for the lands, that there was a claim for restrictions beyond those mentioned in the deeds. *Standard Land & Building Co. v. Schanz*, ... N. J. Eq. ..., 51 Atl. 620 (1901).

The court said: "The purchase by the defendants of the lots in question, for the purpose of erecting their factory, was invited or encouraged by officers or agents of the land and building company, who received part of the purchase money, in payment of a mortgage on the premises; and although this action of the company could not prevent the other complainants (grantees of the company) from asserting their equitable right to restrictions, as against the company itself or its grantees with notice, it did have the effect of throwing the defendants, who were contemplating the purchase, off their guard, as to any restrictions other than those declared by the deeds themselves. The evidence shows that, after the

purchase and payment, and the conveyance of the legal title, but before the erection of their factory, the defendants had notice, or were put upon inquiry, as to the existence of the additional restriction; but their rights as *bona fide* purchasers of the land and the equitable restriction upon their legal rights to the use of their land, so far as it depends upon notice, must, in my judgment, depend upon the notice or knowledge, at the time of the conveyance and the payment of the purchase money and the conveyance of the legal title, and these rights cannot be limited or restricted by notice received after the payment and conveyance. Having received the legal title without notice of any restrictions other than those contained in the deed, the defendants cannot be deprived of their legal estate in the lands, and of its full use and benefit, by subsequent notice of an additional equitable restriction."

§ 345. Purchaser has notice of everything appearing in chain of title.

A purchaser of land has constructive notice of restrictions on the use of such land when they appear in the direct chain of his title, and is charged with knowledge of their purpose. *Hemsley v. Marlborough House Co.*, 68 N. J. Eq. 596, 61 Atl. 455 (1905), reversing 65 N. J. Eq. 167, 55 Atl. 994 (1903).

Where a restriction is incorporated in a deed which constitutes a muniment of title to the land, the law conclusively charges each subsequent holder of the title with notice of it. *Hayes v. Waverly & Passaic R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648 (1893). And this is true although such instrument is not recorded, and such person has no actual notice of its provisions. *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241 (1884).

If restrictions are not so expressed, then notice must be otherwise shown, to charge a purchaser with the servitude of the restrictions. *Webb v. Robbins*, 77 Ala. 176 (1884).

Where a grantee accepts a deed containing covenants restricting the use of the land conveyed in conformity to a general plan of improvement imposed on all the lots of a subdivision by the original grantor, he has actual knowledge of

such restrictions. *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911).

Under a statute providing for the recording of all instruments in any wise affecting the title to any land, and that as to instruments so authorized to be recorded, the record shall thereafter be notice to all subsequent purchasers of the execution of the deed or instrument and its contents, it was held that the purchaser of a lot had constructive notice of an agreement on the part of her grantor, contained in a recorded grant of another lot in the same parcel, restricting the use of such lot. *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982 (1912).

One who takes either a conveyance absolute of land or a lease thereof having notice of a deed forming part of the chain of title of the vendor or lessor, has constructive notice of the contents of such deed, and he is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants. *Catman v. Harland*, 17 Ch. Div. 353 (1881).

§ 346. Recorded instrument as notice.

Where a restrictive covenant contained in a recorded deed is sufficiently clear to convey the requisite information, it constitutes notice to any subsequent purchaser of land on which it is imposed of its existence and effect. *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625 (1910); *Peck v. Conway*, 119 Mass. 546 (1876); *Stevens v. Annex Realty Co.*, 173 Mo. 511, 73 S. W. 505 (1903); *Semple v. Schwarz*, 130 Mo. App. 65, 109 S. W. 633 (1908); *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675 (1909).

Although one has no actual personal notice of the existence of restrictions on property, he is chargeable with such notice if a proper search of the public records would have revealed them. *Appel v. Buckbinder*, 82 N. Y. Misc. 312, 143 N. Y. Supp. 710 (1913).

A grantee in a deed imposing restrictions on the use of the property conveyed, by his acceptance, becomes bound thereby.

Thompson v. Langan, 172 Mo. App. 64, 154 S. W. 808 (1913).

The principle of equity is well established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title, which would be discovered by an examination of the deeds or other muniments of title of the vendor, and of every fact as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. *Whistler v. Cole*, 81 N. Y. Misc. 519, 143 N. Y. Supp. 478 (1913).

Even although a restrictive covenant does not run with the land, but is construed as a simple contract only, if it is a matter of record subsequent grantees of the land take it with notice. *Spencer v. Stevens*, 18 N. Y. Misc. 112, 41 N. Y. Supp. 39 (1896).

Where the owners of adjoining property enter into an agreement restricting the use of their respective parcels, which agreement is supported by a valuable consideration and is acknowledged and recorded, subsequent purchasers of the parcels are bound to take notice of the provisions of the agreement and are bound thereby, where nothing has been done which abrogates the agreement. *Hartman v. Wells*, 257 Ill. 167, 100 N. E. 500 (1913).

Where a tract of land is platted, and the deed from the platters contains restrictive covenants running with the land, it constitutes notice of such restrictions to all subsequent purchasers. *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726 (1913).

Although a purchaser may be charged with notice of restrictions on his own lot appearing in the title to his lot, he is not chargeable with notice of restrictions imposed on all other lots in pursuance of a general plan of improvement, by the fact that the deeds to such other lots contained such restrictions. *Judd v. Robinson*, 41 Colo. 222, 92 Pac. 724 (1907).

Where the owner of two lots conveyed one of them and in the deed it was covenanted that both lots should be subject to certain building restrictions, which deed was filed of record, a subsequent purchaser of the remaining lot took the same with notice of the existence of the building restriction im-

posed thereon. *Whistler v. Cole*, 81 N. Y. Misc. 519, 143 N. Y. Supp. 478 (1913).

Where a grantee's deed specifically refers to the deed to his grantor, which contained covenants imposing restrictions on the premises conveyed, and which further provides that the premises are conveyed subject to certain restrictions, he takes with notice of such covenant, and is bound by them. *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911).

A wife received title to a tract of land through an intermediary from her husband, and the deed to her husband, which was of record, contained a covenant imposing restrictions on the use of the land. It was held that she had notice of such restrictions, and that she was in no better position to resist the enforcement of the covenant than her husband would have been, and that she was to be treated as if she were the covenantor. *Van Sant v. Rose*, 260 Ill. 401, 103 N. E. 194 (1913).

§ 347. — illustrative cases.

A gun club was organized for mutual recreation and pleasure and acquired a tract of three hundred and twenty acres of land for its purposes. By deed, which was duly recorded, it conveyed one hundred and twenty acres thereof for building lots, and provided in the deed "that one of the conditions of this conveyance is that the use of firearms upon said premises is and shall be forever prohibited, and that the said grantees agree for and in behalf of themselves, their heirs and assigns, and all persons claiming by, through or under them to observe and enforce this provision." It was held to be immaterial whether the covenant was one running with the land or was a covenant in gross so far as its enforcement against successors of the grantees was concerned. *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625 (1910).

The court declared that notice of the existence of the covenant was derived by the plaintiff from the recorded deed, and called attention to the fact that the civil code prescribes that the recordation of a grant is notice to subsequent pur-

chasers of its contents. "The recital in the deed," continued the court, "was sufficiently clear to convey the requisite information, and to put the plaintiff upon his guard to the extent to which it affected the remaining lands. Treating the covenant as one in gross, it is proper to apply the rule which binds the conscience of the vendee with notice of a purely personal covenant entered into between his vendor and the one from whom he obtains title, the effect of which, if disregarded, would be to materially injure the remaining property of the original vendor."

A tract of land was conveyed by warranty deed in usual form, and duly recorded, and after a description of the tract with reference to its boundaries by certain streets, it provided that, "the building lines are to be forty feet from the line of the street." Held, that the restriction was binding not only upon the original grantee, but also upon subsequent purchasers of portions of the tract which abutted on the streets named. *Appeal of Townsend*, 68 Conn. 358, 36 Atl. 815 (1896).

The owner of property in the residence portion of a city conveyed a part thereof, and in the deed covenanted that, when she improved her remaining property, the houses should be set back a certain distance from the building line. The deed in question was duly recorded, and subsequently defendant acquired title to such remaining property under a deed in partition from the heirs of the original grantor. Held, that defendant was bound by the restrictive covenant, because he must take notice of the record of the deed in question. *Holt v. Fleischman*, 75 N. Y. App. Div. 593, 78 N. Y. Supp. 647 (1902), reversing 37 N. Y. Misc. 172, 74 N. Y. Supp. 894.

It was said by the court in this case: "It is urged by the respondent that the restrictive covenant is not binding on him, because he never had notice of its existence, and there was nothing disclosed which would put him on inquiry before he completed his purchase and took title to the land.

. . . In the case now before us there was that upon record which gave the purchaser notice of the restrictive covenant which operated to give Perley Holt an easement of

light and air over the restricted area of the plaintiff's premises. The covenant was contained in a deed of adjoining property which came from the same grantor, the source of the defendant's title. In 1866 Ann Bushnell owned the whole plot of 145 feet. The defendant takes from her devisees. In examining the title, it was to be found that in 1866 Ann Bushnell, the owner of the whole tract, conveyed a portion of it, retaining another portion for herself. Her deed to Holt was recorded, and contained the covenant which restricted the portion of the land retained by her. Thus there was placed on record a deed which separated her ownership of the whole tract, and which deed, had it been inspected, would have disclosed the fact that the premises retained by Ann Bushnell were burdened with the easement in favor of her grantee. If that easement had been created by an independent agreement between Mrs. Bushnell and Perley Holt, and placed upon record, can it be doubted that the record would have been notice to a purchaser? . . . Here the agreement is contained in a deed, an examination of which would have been suggested by ordinary prudence. It separated the ownership, and should have been looked to, to ascertain whether restrictions or limitations were imposed upon that portion of the property still retained by the grantor."

§ 348. Unrecorded deed as notice.

An owner of land granted to the city of Atlantic City the right to use a strip of land for a highway which should be a boardwalk, and covenanted in the same deed not to erect any structure on the ocean side of the strip. Between the time of the execution of this deed and of its being recorded, the same owner conveyed the land on the ocean side of such strip to defendant's lessors and the deed was recorded prior to the recording of the deed to Atlantic City. In an action brought by Atlantic City to restrain defendant from building on the land between the boardwalk strip and the ocean, it was held that defendant was not bound by the covenant in the deed to the city which was unrecorded, and that the construction of the boardwalk by the city was not sufficient to

give notice of such covenant. *Atlantic City v. New Auditorium Pier Co.*, 67 N. J. Eq. 59 Atl. 158 (1904), reversing 67 N. J. Eq. 284, 58 Atl. 729.

§ 349. Insufficient instrument, or instrument not proper to be recorded, as notice.

The fact that an instrument, which is not proper to record, is recorded does not raise a presumption that one has notice of such instrument.

The owners of lots fronting on the same street entered into an agreement to the effect that a strip eight feet in width of the front of their respective lots should be left open and unobstructed by buildings for an open space or court, which was declared therein to run with the lots and to be binding upon the heirs and assigns of the parties. The instrument was recorded, but it was not proper for record. Subsequently one of the parties conveyed her lot by deed containing no reference to the agreement, but merely subject to two party-wall agreements, which required the walls to begin eight feet from the street. Held, that the record was not notice to the purchaser of the agreement. *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. 1079 (1893).

"There is no claim that he had actual notice," said the court, "and no claim that he actually knew of the instrument on record in the register's office. But it is claimed that he had notice because his counsel had searched the records. It would be going a great way to hold that in searching the records counsel found such an agreement, and then presume further that he communicated the information to his client. There is no presumption that any one has notice of a paper which is not properly recorded."

A defective and invalid agreement entered into by a number of owners of lots on the same street, attempting to impose restrictions on their property, although recorded, conveys no notice of any restrictions, since it shows on its face that it is invalid and ineffectual for the purpose for which it was intended. *Schefer v. Ball*, 53 N. Y. Misc. 448, 104 N. Y. Supp. 1028 (1907).

An agreement made by an owner of land with an adjoining

owner that, for a period of ten years, he would not sell or permit to be sold on his premises any intoxicating liquor, is a mere personal covenant, and recording it when it is not entitled under the law to be placed of record does not constitute notice to a subsequent purchaser, who takes title by a conveyance which is silent as to such covenant. *Sjoblom v. Mark*, 103 Minn. 193, 114 N. W. 746 (1908). It appeared in this case that the document in question was not entitled to be recorded under the statutes of Minnesota. The court said, regarding this question: "If the instrument was not a conveyance of an estate or an interest in real estate, and was not entitled to be recorded, then its record did not constitute constructive notice. The contract was purely personal between the parties who executed it, and created no interest in or charge upon the land, though it might have been made effective against assigns if embraced as a covenant in the deed."

§ 350. Uniform position of houses as notice of building line.

The uniform position of all the houses on a street, there being a number of them, has been said to be sufficient to put a purchaser on inquiry and charge him with notice of a restriction requiring that the houses be erected that distance from the street. *Tallmadge v. East River Bank*, 26 N. Y. 105 (1862).

In a later New York case, however, it was held that a purchaser was not chargeable with notice of an agreement providing that houses erected on lots, including the lot he purchased, should be set back eight feet from the street, by the fact that when he purchased, the buildings on the lots along the street were generally set back that distance from the line. *Bradley v. Walker*, 138 N. Y. 291, 33 N. E. 1079 (1893).

In this case the court said: "There is some claim made that the defendant may be charged with notice of the alleged agreement, because when he purchased he found the courtyard there in front of the houses. It is quite true that he found the houses generally set back eight feet from the line of the street. But he was not bound to know from that circumstance that there was any binding agreement in reference to

the open space, and it could not be assumed that there was. . . . Indeed, as he looked at the lots at that time he found that the houses located thereon were not uniform in style, height or material, and in the case of several of them there were structures which encroached more or less upon the eight feet."

§ 351. Necessary parties to actions.

It is not essential that all persons entitled to the benefit of a restrictive covenant be made parties to or represented in a suit to enforce such covenant. *Western v. Macdermot*, L. R. 1 Eq. 499 (1866), affirmed in L. R. 2 Ch. 72, 15 L. T. Rep. 641, 36 L. J. Ch. 76, 12 Jur. (N. S.) 366, 15 Wkly. Rep. 265 (1867).

Where the restrictions on the use of lots are for the benefit of all the lots, one grantee may maintain an action to restrain another from violating the terms of the restrictions without joining the grantees of the other lots as parties with him. *Linzee v. Mixer*, 101 Mass. 512 (1869).

Although it appears in an action to enjoin the violation of a restrictive covenant that there is a person not made a party thereto who is a necessary party, a demurrer to the bill should not be sustained on this ground if it further appears that such person was not a necessary party at the institution of the suit.

Thus, the personal representative of a deceased lessee, who died intestate, is a necessary party defendant in an action of this nature brought against such lessee to compel observance of a covenant in his lease, but if it appears from the bill that such personal representative had not at the time of the filing of the bill been appointed, the demurrer to the bill should not be sustained merely because such representative is not made a party to the original bill. This, at least, should not be done until a reasonable time for the appointment of such personal representative and making him a defendant in the cause by amended bill and bringing him before the court by proper process, shall have been allowed by the court, and suffered to pass unheeded. *Frank & Co. v. Brunnemann*, 8 W. Va. 462 (1875).

An objection, in a case of this kind, to a misjoinder of parties comes too late when first made on final hearing, if no injustice will be done the parties by the decree. *Henderson v. Champion*, ... N. J. Eq. ..., 91 Atl. 332 (1914).

§ 352. — grantor under general plan.

The owners of a tract of land laid out into lots, orally agreed among themselves that no building should be erected thereon except for dwellings. The lots were conveyed with this stipulation in the deeds. Held, that the grantees of some of the lots could join in a suit to restrain the breach of the restriction by the owner of one lot, without joining their grantors as plaintiffs with themselves. *Parker v. Nightingale*, 88 Mass. (6 Allen) 341, 83 Am. Dec. 632 (1863).

As to the right of plaintiffs in this action to enforce the observance of the restrictions by the defendant, the court said: "A satisfactory answer to this inquiry will, we think, be found in the fact, which is sufficiently apparent from the allegations in the bill, that the purpose intended to be accomplished by the restrictions inserted in the deeds of the estate, now owned and occupied by the defendant, was for the benefit and advantage of other owners of lots situated on the same street or court. Indeed, it could have been designed for no other purpose. If we lay aside all the facts alleged in the bill which rest in parol evidence only, and look exclusively to the history of the title as shown by the deeds, the conclusion is unavoidable that the original grantors, in whom the title to the entire tract now owned by the several parties to this suit in different parcels was vested, intended, by limiting the use of the several lots, and prescribing the kind of structures which are to be erected by the grantees thereon, to establish a permanent regulation and restriction by which to prevent each parcel from being appropriated to a purpose which might inure to the injury of any other parcel, or render it less agreeable as a place of residence. By excluding all erections for the purposes of trade, and appropriating each lot to a prescribed use as a dwelling-house, the entire neighborhood comprised within the limits of the original tract laid out for a street or court was secured against annoy-

ances arising from occupations which would impair the value of the several lots as places of residence. Thus a right or privilege or amenity in each lot was permanently secured to the owners of all the other lots. While each was restrained in the use of his own estate, he had the benefit of a like restraint imposed on all the other estates. That this restriction or limitation was not imposed by the original grantors for their own benefit or advantage, and cannot be considered as personal to them, is manifest from the fact that they retained no right or interest in any of the parcels of land. The whole tract was conveyed by them. It does not appear that they retained the occupancy or ownership of any of the lots or of any adjoining estate, by means of which they could derive any personal benefit or advantage from the restrictions. But even if they had, it would not change the result; because, by uniting in a scheme or joint enterprise for the division of the estate into lots or parcels on a street or court laid out by them, and annexing to the conveyance of each lot a restriction on its use, by the observance of which each parcel would be occupied for a similar purpose with every other, the legal inference is, in the absence of any evidence to the contrary, that the intention was to secure to each estate the benefit or advantage which might arise from the specific mode in which the adjoining premises were to be improved and occupied. The effect of such a restriction inserted in contemporaneous conveyances of the several parcels, under the circumstances alleged in the bill, was to confer on each owner a right or interest, in the nature of a servitude, in all the lots situated on the same street, which were conveyed subject to the restriction. Thus it entered into the consideration which each purchaser paid for his land, either by enhancing its price in view of the benefit secured to him in the restraint imposed on adjoining owners, or by lessening its value in consequence of the limitation affixed to its use. In this view of the case, it is quite immaterial to determine the precise legal nature or quality of the restriction in question. In strictness, perhaps, the right or interest created by the restrictions, being a qualification of the fee, did not pass out of the original grantors, and now remains vested in them or

their heirs. But if so, they hold it only as a dry trust, in which they have no beneficial use or enjoyment, the entire usufruct being in their grantees and their assigns now holding the estates, for whose use and benefit it was intended. Such being the case, then the latter are proper parties to enforce the restriction; and the former, not having any present interest in it, need not be parties to the proceeding. The same result would follow, if the restriction be construed as in the nature of a covenant by each grantee with the other owners of estates on the street, or others holding under a similar restriction. In either view, the present plaintiffs, having a common interest in the subject matter of the bill, and a right to ask for the same remedy against the defendants, are rightly joined as parties."

§ 353. — party complainant must have some interest to protect.

In cases where the complainant has maintained his right to the remedy by injunction of the enforcement of a restrictive covenant, he has shown that he had some interest to protect for the benefit of which the covenant was created. And in reason and principle this must be true. In general terms, the benefit of a condition in a grant is reserved to the grantor and his heirs without regard to the ownership of other property; but, where the grant contains a restriction in the nature of a covenant that has relation to a benefit to adjoining property, the restriction can only be enforced of title to such adjoining property. *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262 (1901).

It is a fundamental principle of equity pleading that to entitle a party to maintain a bill he must show an interest in the subject of the suit, or a right to the thing demanded, and proper title to institute the suit concerning it. *Foreman v. Sadler*, 114 Md. 574, 80 Atl. 298 (1911); *Dana v. Wentworth*, 111 Mass. 291 (1873). Thus, where the owner of land conveyed a portion thereof for a college campus upon condition that it should be used for no other purposes, and thereafter he disposed of all his land in the vicinity which could be benefited by the performance of the covenant, he had no

standing in a court of equity to enforce observance of the restriction. *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262 (1901).

It has been held that if the plaintiff's property is so remotely situated from that on which the violation of restrictions has, or is about to be, committed that it will not be affected thereby, equity will not enjoin the violation. *Bimson v. Bultman*, 3 N. Y. App. Div. 198, 38 N. Y. Supp. 209 (1896).

In this case it was said by the court: "We are of the opinion that the restraining power of the court should not be exercised unless the property where the frame dwelling is being erected lies in the same street or block with the plaintiff's lots, or if in another street or another block in close proximity to the plaintiff's property. In all the reported cases that have come under my observation the property of the respective parties has been either adjoining or in the same street. The covenant in the deeds permits the erection of two-story brick buildings for residence or business purposes, without any restrictions as to price; and it is quite apparent that buildings could be erected that would be entirely within the restriction which would be more detrimental to the surrounding property than a frame cottage. It is a matter of common observation in cities that the character of buildings in one street has very little effect upon the value of property in parallel streets. That has been so even with the elevated railroads, and those structures have caused little or no depreciation in the value of the property in the parallel streets. We are of the opinion that Bischoff's property and the lots upon Vermont street are too remote from the appellant's lots to be affected by the erection thereon of a frame building."

A bill was filed in equity alleging that complainant and others were the owners of large tracts of land adjoining the city of Los Angeles; that representatives of the proposed university of Los Angeles urged upon the complainant the donation of a tract of land for part of the campus of the university, setting forth the many benefits which would accrue to the owners of land in the vicinity of such an institution, in drives, walks, trees, shrubs, and flowers, college buildings, residences for professors, and in many sales of lots of land

that would be made to those preferring homes amid refinement and culture, where their children could have the advantages of a Christian education; and in furtherance of such plans, and to assist in the establishment of such university, many subscriptions of money and land were thus solicited and received from the owners of land in the vicinity of said campus, and to this purpose complainant and others relying upon these representations, agreed to subscribe and did subscribe, as a gift, the land in question, to be used exclusively as a campus for said proposed university. The complainant, however, did not show in his bill, and it was not shown by affidavit or otherwise, that he was at the time of the filing of the bill the owner of or had any interest in any land in the vicinity of the university buildings or the campus connected therewith. But, on the contrary, it was averred upon information and belief in one of the affidavits that the complainant had no such interest. Inference arose, therefore, that the complainant had not any interest in the benefits arising from the restriction or limitations placed upon the granted estate by the terms of the covenant contained in the deed, and that the complainant would not be damaged by failure of defendants to comply with the terms of the covenant. It was held that the complainant was, therefore, not in a position to maintain the action. *Los Angeles University v. Swarth*, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262 (1901).

In an action in which a number of persons are joined as parties plaintiff who have no interest in enforcing the covenant, it is of no consequence so long as one of the parties plaintiff has such an interest. If defendant made no motion at or prior to the trial of the suit to dismiss as to certain of the plaintiffs, he can take no advantage of the misjoinder thereafter. *Smith v. Graham*, 147 N. Y. Supp. 773 (1914).

§ 354. — complainant without property affected by restriction.

It has been held that where the owner of a tract of land in deeding lots therein inserted restrictive covenants in the deeds for the benefit of the grantees, he may join in a suit with one of them to enforce observance of such restrictions by other

lot owners in the tract, although he has parted with all interest in the lots. *Riverbank Improvement Co. v. Bancroft*, 203 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730 (1911). Such grantor, although no longer the owner of land to be benefited by such restrictions, is nevertheless deemed to have some interest in their enforcement, and therefore he may appear to aid in their enforcement for the benefit of his grantees.

Where the owner of land conveyed it by deed imposing certain building restrictions thereon, he could thereafter maintain a suit to enjoin violation of such restrictions, although he owned no other property in the vicinity; it being deemed in such circumstances that the owner, by conveying his land subject to such a covenant, reserved an interest therein which would entitle him to maintain such a suit, and that the general rule that one having no interest in land in the vicinity which could be affected by a violation of the restrictions cannot maintain an action to enforce observance of such restriction. *Van Sant v. Rose*, 260 Ill. 401, 103 N. E. 194 (1913).

In this respect the court said: "As absolute control over the property was denied the purchaser by the restrictions assented to, he presumably paid less for it than he would otherwise have been required to pay. At all events, the restrictions were mutually agreed to. They are plain and unambiguous, and there is no pretence that there was any concealment of any fact when they were agreed to. Can defendants now violate or disregard the contract, on the ground that its performance will be of no benefit to complainants? It does not appear that the relations of the parties complainant to the property have changed since the covenants were agreed to. The answer avers that complainants did not then own, and had not for a long time prior thereto owned, any land in the neighborhood of the property. If the defendants may now disregard their covenants, it is because they were not valid or enforceable when made. . . . True, a bill to enjoin the breach of restrictive covenants cannot be maintained by one having no connection with or interest in their enforcement; but we cannot agree that complainants had no interest. They were the original covenantees

and by their conveyance of the property reserved an interest in it. They conveyed the property subject to that interest. They had a right to reserve such interest, and this right was not dependent upon the covenantees having other property in the vicinity that would be affected by a breach of the covenants or that they should in any other manner sustain damages thereby. . . . It would seem inconsistent, then, to say, as the covenantees had no other land in the neighborhood, they had no interest in the performance of the covenants. The only purpose their having other land in the vicinity could serve would be to show that they would be injuriously affected, that is, damaged—by a violation of the contract. But, as their right does not necessarily depend upon their being damaged by the breach, it would seem it would not necessarily depend upon their owning other land in the vicinity.”

§ 355. Contractor as party defendant.

In an action to enjoin the violation of restrictions on property and to compel the removal of a building constituting the violation, the contractor who erected the building is not a necessary party, where there is no temporary restraining order. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

In this case the court said: “The evidence clearly shows that Hunter was simply a contractor doing work on the building, and we think it was erroneous to impose on him the expense of removing the building. A mechanic working on a house, even a contractor, ought not to be held bound to proceed at his peril because, on grounds like those in this cause, an injunction suit has been begun to stop the work, but no temporary writ is in force. It is enough to require, in the final decree, that the real parties in interest shall make good whatever wrong has been done by erecting an unlawful structure.”

§ 356. One who assumes to act as owner, as party defendant.

One who assumes to act as owner of restricted property and takes part in the improvement thereof in violation of the

restriction, is a proper party to an action to enjoin such violation of the restriction. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

In this case the evidence showed, and the court held, as follows: "Whether Hynson was interested in the title to the lot cannot be determined positively from the record; it may be stated that there is uncertainty about who owns the premises. Dixon took the title by conveyance from T. A. Davidson, but swore he (Dixon) was a straw man in the transaction and did not know who the real owner was. It is certain that Hynson was concerned about the building of the flat, was on the premises while they were in process of erection, was notified by Sanders not to proceed with the work and declared he intended to disregard the restrictions; that he assumed to act as owner by refusing, as too little, an offer for the lot; and in other ways took a hand in making the improvement. We think it sufficiently appears he was an active party in the work to prevent us from interfering with the decree of the lower court against him. Besides, some of the deeds in evidence may have shown he was the true owner, as the petition alleges."

§ 357. Actions between landlord and tenant in relation to restrictions.

Ordinarily a tenant for years has no title to the land and has no right to enforce any of the covenants made in any of the deeds which constitute the chain of title; but for some purposes a tenant is in privity with his landlord and may maintain an action against anyone who interferes with his possessory right.

Building restrictions, particularly when negative, create a right which may be enforced by anyone interested in the property whose interest may be affected by a violation of such restriction. And this is true without regard to the question of privity either of contract or of estate, and without reference to whether the covenant is one which runs with the land or not. A tenant for years of land, for the benefit of which a restrictive covenant was created, was held to be entitled to enjoin a threatened interference with the exercise

of his rights under a restrictive covenant. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

A landlord, having leased his property for the benefit of which restrictions were imposed on other property, cannot after the execution of the lease deprive his lessee of the benefit of such restrictions. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

Where the owner of a tract of land conveyed a portion thereof and in the deed the grantee was to perform certain acts which would be to the benefit of the land retained by the grantor, and the grantor subsequently leased the remaining portion of his land, the tenant thereof could maintain an action against the grantee for failure to perform the covenant in question. *Brockmeyer v. Sanitary District*, 118 Ill. App. 49 (1905). In this case the lessee was the owner of the possessory title to the land at the time when the breach of covenant occurred, and he sustained the damages by reason of the failure of the grantee to perform the covenant.

So, where one leases premises forming a part of a tract of improved land which is, and which he understands to be, subject to certain restrictions, he is entitled to an injunction restraining the owner of the tract from authorizing any of the other houses in the tract to be used for a purpose in violation of such restrictions. *Spicer v. Martin*, L. R. 14 App. Cas. 12, 60 L. T. Rep. 546, 58 L. J. Ch. 309, 37 Wkly. Rep. 689, 53 J. P. 516 (1888).

In the case cited one Spicer owned a portion of a tract of land so restricted, and leased one of the houses, the lease containing a restrictive covenant of the same nature, and during the negotiations of the lease statements were made by Spicer's solicitors to the lessee whereby he became aware that similar restrictive covenants were contained in all the leases granted by Spicer to houses in that tract and also became aware of the terms of the conveyances of the tract to Spicer which imposed the restrictions. In this respect Lord Macnaghten said: "It seems to me that when Mr. Spicer put his houses in Cromwell Gardens on the market he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one

calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representatives be permitted to destroy the value of the thing sold by authorizing the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?"

A lease contained a covenant that "the said lessee will not sell liquor upon the premises except in the due course of his business as a druggist." The lessee assigned the lease to another, and his assignee sub-let a portion thereof for a liquor saloon. It was held that while the lease imposed the condition that the lessee should not sell liquor, it did not require him to see that no liquor was sold on the premises by a sub-tenant, and that the fact that liquor was sold by a sub-tenant of the lessee did not work a forfeiture of the lease as against the lessee under this condition. *Granite Building Corp v. Greene*, 25 R. I. 586, 57 Atl. 649 (1904).

A tenant who has no notice, either actual or constructive, of restrictions imposed on the use of the land which he occupies under a lease, is not liable for the violation of such restrictions, and is not a proper party defendant to a suit to enjoin the violation of the restriction.

The grantee of a piece of land in fee covenanted in a separate instrument with his grantor that for twelve years and a half no building on the premises should be used for "the sale of ale, beer, spirits, wine, porter, or as an inn, public house, or beer house." He sold the land and his assignee took the same with notice of such restrictions and let it from year to year to a tenant who opened a public house thereon. Upon a bill for an injunction against the assignee and his tenant, the latter having no knowledge of the agreement, to enjoin the violation of such restriction, it was held that no relief could be had against the tenant, who, if he had asked his lessor, would have been told that there was no restriction, and if he had seen the conveyance, would have found none. *Carter v. Williams*, L. R. 9 Eq. 678, 23 L. T. Rep. 183, 39 L. J. Ch. 560, 18 Wkly. Rep. 593 (1870).

§ 358. Sub-lessee as proper party.

In order to make a restraining order forbidding the violation of a restrictive covenant in a lease effectual, it is necessary to enjoin all persons engaged in violating the covenant; not only the lessees, but all others, who under them, by their authority, consent or direction, are assisting in the breach of such covenant. The action, therefore, so far as equitable relief is concerned, is properly brought against the lessees and tenants jointly. This does not produce a misjoinder of actions; there being but one cause of action, namely, the breach of the lessee's covenant, all the persons so made defendants are necessary parties to enable the plaintiff to obtain adequate relief in the premises. *Gillilan v. Norton*, 6 Rob. (29 N. Y. Super. Ct.) 546 (1867).

A sub-tenant is bound by the restrictive covenants contained in the lease between the owner of the premises and the immediate lessor of the sub-tenant. *Bartholdi Realty Co. v. Robard Realty Co.*, 156 N. Y. App. Div. 528, 141 N. Y. Supp. 353 (1913); *Ambler v. Skinner*, 7 Rob. (30 N. Y. Super. Ct.) 561 (1867); *Stees v. Krans*, 32 Minn. 313, 20 N. W. 241 (1884).

"A sub-lessee is bound by the restrictive covenants entered into by the head landlord, though he had no actual notice thereof." 1 McAdam, *Landlord & T.* (4th ed.), 894. And he may be enjoined from violating the stipulations in the original lease, at the suit of the lessor, without making the original lessee a party. *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67 (1853).

The owner of business premises leased the same subject to a restrictive covenant on the part of the lessee not to "affix or permit any outward mark or show of business to be affixed" on the demised premises. The lessee subsequently sub-let two rooms comprised in the agreement and the right to use the entrance in common with the other tenants of the house. The sub-tenant carried on the business of a tailor, and put up in the window of one of the rooms a wire blind which had inscribed on the side of it towards the street the name of her firm, and also a white roller blind with the name of her firm

inscribed thereon. She also placed on the iron railings on the outside of the common entrance brass plates containing the name of her firm followed by the word "tailors." In an action brought by the owner of the premises against both the lessee and sub-lessee to enjoin the violation of the restrictive covenant in question, it was held that injunction would be granted to restrain the sub-tenant from breaking the covenant, and that the injunction must also extend to the lessee, because he had not parted with the possession of the entrance and had sanctioned the putting up of the blinds. *Evans v. Davis*, L. R. 10 Ch. Div. 747 (1878).

In regard to this question the court said: "One other question remains for consideration, viz., whether Davis ought to be included in the injunction. He granted a license to Mrs. Browne to put up a movable brass plate, so far as he was able to give the license, but he required that the brass plate should be approved by his lessor. It does not appear that that approval was ever given, but it does appear that Davis remained the occupier of the entrance in Clifford street at which the brass plate was put up by Mrs. Browne, and that the only right of Mrs. Browne in that entrance was under a license to use in common with the other occupiers and tenants of the house. Davis, therefore, continued in possession of that entrance, and he is responsible to his lessor for everything which has been done upon that entrance. Now what was done by Mrs. Browne was a thing which she had no right to do. She had no right under Davis' license to do it as against him. He might, therefore, have stopped it at any moment. He did not choose to stop it, though his attention was called to the breach by the plaintiff, but he allowed the objectionable mark to remain. He could only be relieved from the burden of the injunction if he had shown these two things, that he had parted with his whole interest in that part of the premises which is affected by the injunction, and that he was entirely free from blame. Neither of those two things has he shown. It is further to be borne in mind, that he has admitted by his pleadings that the wire blind was erected by his permission and consent. On these grounds I decide that the injunction must go against Davis."

A provision in a lease forbidding the sale of intoxicating liquors on the demised premises, and providing for the forfeiture of the estate as a penalty for violation, may be violated as well by a sub-lessee as by the original lessee so as to constitute a forfeiture of the lease. *Ft. Worth Driving Club v. Ft. Worth Fair Assn.*, 103 Tex. 24, 122 S. W. 254 (1909), reversing 121 S. W. 213.

In this respect the court said: "It is true that there is no privity between the lessor and a sub-lessee, such as makes the covenants of the lease binding upon the latter personally; but it is equally true that stipulations, like that in question, forbidding the use of the premises for a specified purpose, run with the land, and are in the nature of conditions, and the forbidden use of them by a sub-lessee is as much a violation of such a provision, and furnishes as good ground for forfeiture and re-entry as if it were the act of the original lessee."

One who enters into vacant demised premises by the consent or permission of the lessee, will be considered in respect of the lessor's rights as substituted in the place of the lessee, although he disclaims all privity with the tenant. And if such person violates the terms of the lease under which the tenant holds by carrying on some business prohibited by the terms of the lease, equity will enjoin him. *Howard v. Ellis*, 4 Sandf. (N. Y.) 369 (1851).

§ 359. Lessor of bankrupt lessee.

The owner of a tract of land forming a part of a private residential estate conveyed the same to defendant, and in the deed the defendant covenanted for himself, his executors, administrators, and assigns, with the grantor, his heirs, executors, administrators and assigns not to erect any buildings on the land other than private residences (with suitable outbuildings to be erected in the rear thereof). Thereafter the defendant leased the land subject to the same restrictions and conditions. The lessees violated the terms of the covenants, and thereafter became bankrupt. On the disclaimer of the lease by the trustee in bankruptcy the defendant re-entered upon the land. It was held that the defend-

ant was not liable for the past breaches of the covenants by his lessees. *Powell v. Hemsley*, 101 L. T. Rep. 262, (1909) 2 Ch. 252.

In respect of this case the court said: "It is undoubtedly a curious case, because it all arises as a consequence of that remarkable provision of the bankruptcy acts authorizing the trustee of a bankrupt lessee to surrender the property, or, rather, I should say, to disclaim the lease, which has the effect of the surrender of the property of the bankrupt. In effect the landlord becomes a compulsory and involuntary purchaser of the property which is disclaimed. . . . Then, lastly, it is said, although it is true that Hemsley did not put up this building, and did not erect it, and although it is true that it was returned to him against his will, yet in the circumstances which are proved he must be taken as assisting in, and to be a party to, the breach of the covenant which was committed by Taylor and Fletcher. If it can be made out that a person who has not himself done the work has really been actively assisting and encouraging in something more than words the one who is in the real sense the wrongdoer to do what he has done, then I do not doubt that the arm of the court is long enough to reach him. . . . With great respect to the learned Lord Justice, I doubt whether that proposition can be readily maintained. I therefore am driven to the conclusion that the plaintiff has no right at common law to damages for breach of any covenant by lessees, and I think also that he, being in this matter simply in the position of assignee of the lessee, is not liable to the peculiar but really invaluable jurisdiction of the court because he has not himself done anything in the matter."

§ 360. Actions between lessees.

A lessee under a lease in which the lessor agrees not to let other premises of his for the same purpose, cannot maintain an action for injunction against a subsequent lessee of such other premises, to restrain him from the enjoyment of his lease in a manner which violates the terms of his own lease. Such subsequent lessee is not a party nor is he privy to the

former lease. *Nappa Valley Wine Co. v. Boston Block Co.*, 44 Minn. 130, 46 N. W. 239 (1900).

§ 361. Mortgagee.

A mortgagee of real estate, even though out of possession, has such an interest as enables him to maintain an action for any part of the mortgaged estate wrongfully severed and converted into personality. To this extent he is owner of the fee. The reason for this is that the value of his security may be damaged. This reason extends to any act, whether done on the mortgaged premises or off, which may adversely affect the property described in his mortgage. He may maintain an action in the nature of waste, or may go into equity to prevent the commission of waste.

So, it seems that any one having a substantial interest in property so situated, may bring an action to prevent the violation of restrictions imposed for the benefit of such property. In this respect a mortgagee and the owner of the equity of redemption of a lot of land may join as parties plaintiff in such a suit. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910).

Where a tract of land has been laid out and improved and lots sold therein subject to restrictions, according to a general plan, a mortgagee of one of the lots has a right to maintain suit in equity against any one who is violating the restrictions in the use of any other lot in the tract subject to them. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910).

It was here said by the court: "Restrictions like these create a right in the nature of an easement in favor of, as well as impose a liability upon, the grantee of every lot, growing out of the common character of the deeds. The interest is in a contractual stipulation for the common benefit. The nature of the right and obligations created by restrictions upon the use of real estate is such as to render their breach an injury to the fee of other land included within the scheme of improvement. A mortgagee is allowed to go into equity to prevent injuries threatened to the land conveyed by his mort-

gage, because any act in its nature capable of harming the value of his security may be such an injury as to entitle him to relief and protection. Mortgagees are commonly permitted to bring suit in equity to nullify the orders of public boards, or test the constitutionality of statutes, which in operation would impair their security. This principle includes the present case. There is no distinction in reason between bringing a suit by a mortgagee to restrain waste upon the mortgaged premises and one to prevent access on other estates in derogation of legal rights established for the benefit of the property covered by the mortgage."

In an action to enjoin the erection of a building in violation of restrictions placed on the land by covenants in the owner's deed, the holder of a mortgage executed prior to the commencement of the suit on which no money was advanced until after the suit had been commenced, was held not to be a necessary party. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

"We hold," said the court, "that Gray was no necessary party. In fact, he acquired the note secured by the deed of trust, just before this case was tried in the circuit court and long after the filing of the notice of suit in the office of the recorder of deeds. The suit was instituted February 18, 1901. On January 22, of that year, Dixon gave a note for ten thousand dollars secured by a deed of trust on the premises; Charles Nicholls was the party of the second part in the deed and George A. Duff the third party. The instrument was recorded February 7, 1901; hence, before the institution of the suit or the filing of notice. But the evidence conclusively shows no money was furnished on the note until afterwards. Dixon appears to have acted in the interest of Nicholls and Ritter, who were engaged in the real estate business in St. Louis. He received no money and had no personal interest in the matter. The money was used in paying, in installments, the cost of the improvement as the work progressed. Nicholls swore the custom of his company in making such loans was to exact a note and deed of trust from the owner of the property; advance, as needed, out of their own funds, money to pay for the construction of the house and

finally sell the note to some client. That course was followed in this case and Gray, who is now said to be a necessary party, purchased the note, not only after the suit was brought, but while it was on trial. Nicholls and Ritter, who were the real parties to the loan up to that time, furnished the money after the institution of the action and filing of notice of suit, and after they had received actual notice in writing from the attorney of the plaintiff that the erection of the flat would be contested. Gray having acquired his interest pending the suit, acquired it subject to any decree that might be rendered."

§ 362. Heirs and assigns.

If it is intended to bind the heirs and assigns of parties to restrictive covenants it must be either expressly stated, or there must be something in the instrument to show that such was the intention. Where it shows that such words were deliberately omitted from the instrument, they will not be bound. As was said by the court in one case: "Persons who are men of business as they are here are able to get protection and advice and they must make their covenants express so as to state what they really mean and they cannot get a court of law or equity to supply something which they have not stipulated for, in order to get a benefit which is supposed to have been intended. If it was so intended, it would have been easy to so frame the covenant that the restrictions would have attached to the remaining lands of the grantors, or to have covenanted for their heirs and assigns, as the grantee did in the covenant he entered into." *Wood v. Stehrer*, 119 Md. 143, 86 Atl. 128 (1912).

Where a restriction is made binding by express words upon the heirs and assigns of the grantor and by express words is made to attach to the heirs and assigns of the grantee, it can be enforced by and against any assignee with notice. *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662 (1888).

When a mutual agreement between two property owners restricting the use of their respective properties is expressly made to bind the parties and their heirs and assigns, the equitable right to the enforcement of the agreement by a purchaser from one party against the purchaser from the

other party with notice of the agreement necessarily exists. *Wootton v. Seltzer*, ... N. J. Eq. ..., 90 Atl. 701 (1914).

A mutual agreement between owners of lots in a subdivision that only one dwelling house should be erected on each of their lots, and in which they stated that, "in consideration of the mutual covenants herein contained we do hereby agree to and with each other, and for our and each of our heirs, executors, administrators and assigns," was held to be binding, not only on the parties to the contract, but also on their assigns, and that the covenant might be enforced by or against the grantee of an original signer. *Erichsen v. Tapert*, 172 Mich. 457, 138 N. W. 330 (1912).

The owners of land leased a portion thereof and in the lease the lessee covenanted for himself and assigns to observe a certain building line, and the grantors covenanted for themselves and their assigns "not to erect or permit to be erected on the adjoining land of the grantors any building projecting beyond the said building line." The lessee erected a house on the demised premises, and assigned his lease to another. The grantors agreed with one T. for the erection of a house on the adjoining land, to observe the building line, and on the completion of the house T. was to be granted a lease thereof. The house was erected and projected about four feet beyond the building line, and the grantors expressed their intention of granting T. a lease. It was held that T. was an "assign" within the meaning of the covenant, and was bound thereby. *Ricketts v. Churchwarden of Enfield*, 100 L. T. Rep. 362, (1909) 1 Ch. 544.

However, it is not necessary that the word "assigns," or other equivalent word, should be used in the covenant in order to entitle an assignee of the land, for the benefit of which the covenant was made, to maintain an action in his own name for breach of the covenant. *Brockmeyer v. Sanitary District*, 118 Ill. App. 49 (1905).

If the grantor of land, in the conveyance of which the grantee covenanted relative to the use thereof, does not bind himself to observe any restrictions, any of his subsequent grantees of the land retained by him cannot be charged with an obligation to observe any restriction, because they take

the rights of their grantor, who was not bound by any. *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111 (1907).

A reference to an agreement which has no existence in fact in a deed of conveyance to land does not bind the grantee therein, as it is meaningless. And where a grantee takes land by a conveyance which contains reference to an agreement which is not in existence, but which is afterwards made and which attempts to establish a building line on property including the grantee's property, the latter is not bound thereby. *Clevenger v. Quinn*, 79 N. J. Eq. 485, 83 Atl. 771 (1911).

§ 363. Husband covenanting without wife.

A grantor is bound by the covenants of his deed, although his wife's release of dower and homestead in the same conveyance is not executed so as to be binding upon her. *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341 (1876).

§ 364. Railroad company.

If a restriction extends to the use of land by an elevated railroad, although the road be operated with care and skill, the owner of the land for the benefit of which the restriction was imposed may restrain such use being made of it. *Hayes v. Waverly & Passaic R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648 (1893). Such a stipulation, whether it runs with the land or not, affects the price paid for the land, and becomes property purchased with value, which equity will protect.

§ 365. State as party complainant.

Where a state, owner of land, entered into an agreement with an adjoining owner whereby streets were laid out through the whole territory and certain restrictions placed on the lots, the state, acting through its attorney general, could enforce the restrictions in equity against anyone bound by them. *Attorney General v. Gardiner*, 117 Mass. 492 (1875).

The state, it was said, in executing the agreement and laying out the streets, acted in a twofold capacity; as the proprietor of lands which it held and might sell, as an individual might; and as the sovereign power, authorized to lay out highways for the benefit of the public. "The provisions and restrictions contained in the indenture, against building on the

front part of the lots, are manifestly intended not merely to enhance the market value of the lands, but also to increase the symmetry and beauty of the highways laid out through them. The commonwealth may therefore enforce these provisions and restrictions, against all persons bound by them."

An act of the legislature of Pennsylvania authorized the governor, upon certain conditions, to make a deed in the name of the commonwealth conveying certain ground to the city of Philadelphia, which deed was made containing a provision that "no part of said ground lying to the southward of the state house, within the wall as it is now built, shall be made use of for erecting any sort of buildings thereon." Held, that only the state could complain of the erection of a monument by the city on the restricted land on the ground that it violated the restriction. *Society of the Cincinnati's Appeal*, 154 Pa. St. 621, 26 Atl. 647, 20 L. R. A. 323, 32 Wkly. N. Cas. 249 (1893).

§ 366. Persons liable for damages.

The party to whom a right of action accrues on account of the violation of a covenant that runs with the land is not limited in his right of action to the person whose immediate acts violates the covenant. Each grantee becomes liable for a violation of the covenant, so long as he holds legal title to the premises conveyed under the deed containing the covenant. *Polk v. Givens*, 44 Ind. App. 667, 90 N. E. 19 (1909).

On the other hand it has been held that an action for damages for breach of a restrictive covenant can only be brought against the person breaking the covenant, and not against a subsequent grantee who does not continue in such breach. *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048 (1909).

CHAPTER X.

DEFENSES TO ACTIONS TO ENFORCE OBSERVANCE OF RESTRICTIONS.

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§ 367. Generally.

When equitable as distinguished from legal relief is sought, equitable as distinguished from legal defenses have to be considered. The conduct of a plaintiff may disentitle him to relief; his acquiescence in what he complains of or his delay in seeking relief may of itself be sufficient to preclude him from obtaining it. And further, before granting equitable relief, courts of equity look not only to the words of a covenant, but to the object to attain which it was entered into; and if, owing to circumstances which have occurred since it was entered into, such object cannot be attained, equitable relief will be refused. It is upon this ground that restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if such land has already been so laid out or used that its preservation as intended is no longer possible. Such a state of things can seldom, if ever, have arisen except from a departure by the vendor of the scheme, and purchasers from him, or from the acquiescence or laches of those entitled to enforce the observance of the covenant in question. But whatever the explanation of the altered state of things may be, if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused. *Knight v. Simmonds* (1896) 2 Ch. 294, 74 L. T. Rep. 563, 65 L. J. Ch. 383, 44 Wkly. Rep. 580.

§ 368. That enforcement of restriction would be inequitable.

Where a proper case is shown for the exercise of equitable jurisdiction, relief is granted as a matter of course; but if, under the conditions and circumstances obtaining, the granting of the relief sought would work injustice or be ineffectual of any meritorious result, it will be refused. In this sense the jurisdiction of equity to afford relief in case of the violation of restrictive covenants, is discretionary. If, therefore,

the restrictive covenants in deeds conveying lots, were made with reference to the continuance of existing general conditions of the property and surroundings, but in the lapse of time there has been a change in the character of the surroundings, so as to defeat the purpose of the covenants and to render their enforcement an inequitable, unjust and useless burden on the owner of the property, equity will refuse its aid and leave the plaintiff to his remedy at law. *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027 (1905).

Of necessity, a court of equity will not enforce restrictions when to do so would be inequitable. *Union Trust & Realty Co. v. Best*, 160 Cal. 263, 116 Pac. 737 (1911).

Parties may by their own acts place themselves in a position where equity will not interfere, or the property and the uses to which it may be put and the character of the vicinity and environment may be so changed that the purposes for which the restrictions were imposed will not be affected by their enforcement. In such cases enforcement may be denied. *Hartman v. Wells*, 257 Ill. 167, 100 N. E. 500 (1913).

Although there is a technical violation of a covenant in a lease, an injunction will not issue if it appears that the complainant has suffered no injury, and the grant of the relief prayed for would do wrong rather than prevent it. *Neiman v. Butler*, 19 N. Y. Supp. 403 (1892).

Likewise, if the restrictive covenant is unreasonable, a court of equity will refuse to enforce it. *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492 (1912), affirmed in 81 N. J. Eq. 210, 86 Atl. 398 (1913).

"Equity will not, as a rule, enforce a restriction, where, by the acts of the grantor who imposed it or of those who derived title under him, the property, and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction, or, in short, it may be said that where, from all of the evidence it appears that it

would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law." *Evertsen v. Gerstenberg*, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310 (1900).

If the restrictions in question are of substantial value to the dominant estate, a court of equity might enforce them even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other. An injunction that bears heavily upon the defendant without benefiting the plaintiff will always be withheld as oppressive. *Batchelor v. Hinkle*, 210 N. Y. 243, 104 N. E. 629 (1914), reversing 149 N. Y. App. Div. 910.

A court of equity will not enforce the observance of a restriction against the erection of any apartment house, where nineteen of the twenty-five years for which the restriction was intended to run have elapsed, and the intention of the parties in making the covenant has been defeated by the erection of stores and apartment houses in the immediate vicinity by persons not under the control of the defendant, so that the enforcement of the covenant in the particular instance could not restore the neighborhood to its former condition and make it desirable for private residences, and the injunction would bear heavily upon the defendant without benefiting the plaintiff, and the damages sustained, if any, can be recovered in an action at law. *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961 (1905), reversing 97 N. Y. App. Div. 518, 90 N. Y. Supp. 213 (1904).

In this respect the court said: "Nineteen of the twenty-five years which bounded the life of the covenant in question have passed, and the object of the parties in making it has been defeated by the unexpected action of persons not under the control of the defendant. Under the circumstances now existing the covenant is no longer effective for the purpose in view of the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residences. If the building restriction were of substantial value to the dominant

estate, a court of equity might enforce it even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive. No injustice is done, for the damages sustained can be recovered in an action at law, and the material change in the circumstances so affects the interests of the parties as to make that remedy just to both."

A covenant was incorporated in a deed for the purpose of protecting the locality from businesses that were likely to create a nuisance and buildings of the cheapest grade, and of bringing to the locality a better class of buildings, and insuring its occupation by quiet, orderly and well-to-do people. With this intention the covenant fixed the minimum cost of buildings to be erected thereon. It was held that when the term of such covenant had nearly expired, and the character of the locality had so changed as to render it apparent that buildings of the class contemplated by the covenant would not be built on the land in question, and that, upon the expiration of the covenant, cheaper buildings would be erected on it, and that, in the meantime, if the covenant should be specifically enforced, the land affected by it could not be profitably used, and the complainant, himself, had built a house upon the affected land which did not comply with the spirit of the covenant, a court of equity would not enforce obedience to that part of the covenant fixing the minimum cost of buildings, especially where it appeared that the erection objected to would not be detrimental to the complainant, but left the parties to their remedy at law. *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11 (1890).

Speaking generally, however, in the enforcement of restrictive covenants the court has no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own past conduct, delay, laches, or the like, disentitled himself to sue; that is to say, has raised against himself a personal equity. *Osborne v. Bradley*, (1903) 2 Ch. 446, 89 L. T. Rep. 11.

§ 369. Performance of restriction impossible or impracticable.

A court of equity will not attempt to compel a party to do a thing, substantially impracticable, and which, if done, as nearly as is practicable in the nature of things, would not only be a great injury to the party sought to be coerced, but would be of no practical utility to the complainant.

The owner of premises let them under a lease providing that the premises should be preserved by the lessees in tenantable order, but that they should make no alteration without the consent of the lessor in writing. It was held that in such a case, when it is not alleged in the complaint that the alterations are an injury to the demised premises, the court will not entertain jurisdiction of an action merely for the purpose of compelling the lessees to restore the premises as exactly as possible to the condition they were in when hired, especially when it appears that doing so would be a great injury to the lessees and no benefit to the lessor. It will, however, inhibit further alterations. *Engle v. Owen*, 3 Duer (10 N. Y. Super. Ct.) 15 (1854).

In this case the court said: "There is no difficulty in restraining the defendants from making further alterations; but it is physically impossible to put the premises in the same order and situation that they were at the time the lease was executed. The extension built can be torn down, and all new materials that have been added can be removed, but the old materials cannot be restored, and if they could be, the court would not interfere to compel it to be done. Such an act could be of no benefit to the plaintiff. If the alterations made can be shown to be an injury to the plaintiff, he has a perfect remedy by action to recover the damages. So far as the alterations that have been made can be regarded as a breach of the contract, it is a breach which cannot be repaired by replacing the property in the precise condition in which it was before the alterations were made. That is impossible."

§ 370. Abandonment.

Among the equitable grounds which the courts have declined to interfere by injunction in cases in which it was sought

to enforce the observance of restrictive covenants, are abandonment and acquiescence, brought about or participated in by those who were seeking to enforce the covenant.

Where the owner of a number of lots facing on the same street conveyed several of them to different purchasers under restrictions providing that no building should be erected thereon nearer than twenty-five feet to the street, and immediately thereafter the grantor and all of the grantees of such lots erected buildings within fifteen feet of the street, it was held, that this was sufficient to show a complete abandonment of all the rights under the covenant, so that one owner of a lot could not be restrained by other owners from erecting a building within five feet of the street. *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668 (1907).

"Now it is a well established rule in equity jurisprudence," said the court, "that a court will not lend its aid to restrain the violation, or for the specific performance of a restriction, such as that involved in this case, when it appears that such restriction was inserted in the deed as parcel, and in pursuance of a general plan of improvement which has since been abandoned by those in whose favor the covenant was executed and who are seeking to enforce the same."

A restrictive covenant in a deed may be waived or abandoned by the subsequent conduct of the grantor, so that a court of equity will not interfere to prevent its violation. *Duncan v. Central Passenger R. Co.*, 85 Ky. 525, 4 S. W. 228 (1887).

It is well settled that the equitable right to enforce restrictive covenants may be lost by a degree of acquiescence in their violation amounting to an abandonment of the right. *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675 (1909).

Equity will not enjoin the breach of a restriction imposed as part of a general plan of improvement where the original plan has been abandoned or the right waived. *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84 (1910); *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911).

Where the plaintiff has acted in such a manner as to lead others to treat the servient estate as if free from the servitude, he will be regarded, as to those who have acted on the faith

thereby induced, as having abandoned his rights under such covenant. *Du Bois v. Darling*, 12 Jones & S. (N. Y.) 436 (1879).

A man cannot come into a court of equity for an injunction to restrain the violation of a restrictive covenant who has wilfully allowed it to be broken by divers persons bound to the same restrictive covenant, with the view, either of harassing or annoying, or of obtaining special advantage against, one covenantor in particular. *Kelsey v. Dodd*, 52 L. J. Ch. 34 (1881).

The principle asserted in such cases is that it would be inequitable to give to the plaintiff the benefit of the covenant which, by his conduct, he has seen fit to treat as void and of no effect. It is obvious that the doctrine is in the nature of an equitable estoppel arising from the conduct of the complaining parties which appears tantamount to an implied agreement, at least among them, to the effect that they would not abide the covenant. In view of the fact that under such circumstances, other persons are likely to be led into violations by the conduct of the covenantees, equity requires diligence on the part of those who invoke its preventive aid, and a slight degree of acquiescence is sufficient to defeat complainant's bill. *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668 (1907).

The right to enforce a restriction was held to be wholly extinguished by non-user for twenty years or more, in view of the fact that the land subject to such restriction was used in a manner inconsistent with the existence of the restriction. *Smith v. Price*, 214 Mass. 298, 101 N. E. 370 (1913).

The mere fact that there has been no cause for petitioning equity to enforce the observance of property restrictions by reason of the fact that there has been no material violations thereof, will not charge complainant with having abandoned his rights under such restrictions, no matter for what period of time such condition has continued to exist.

It has been held that where the defense is that the complainant has permitted other violations of a similar nature, the question arising is one of abandonment, and not of estoppel. *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808 (1913).

§ 371. — illustrative cases.

A strip of land was conveyed subject to the restriction that it should never be built upon, but always remain an open space in front of the houses of the grantor and grantee. No restriction was contained in the deed relative to the character of the buildings to be placed on the lots of the parties abutting on the strip. Held, that the fact that a high close fence was maintained near the eastern line of the strip of ground, or that the buildings on the lots of the parties changed in character, or that lunch tables at an annual fair were placed on the strip, did not show an abandonment of the restriction. *Witherspoon v. Hurst*, 88 S. C. 561, 71 S. E. 232 (1911).

The owner of a tract of land lying between two streets divided it into lots, which were sold at auction, one of the terms of sale being that, "between the lots there shall be a railway fourteen feet wide, to be for the common benefit of all the lots bounding on it, to be used for no other purpose than a railway, and no building is ever to be built over it." The deeds conveyed the fee to the center of this strip, subject to the easement mentioned. The tracks in question were laid, but their use for a railway was afterwards abandoned. More than twenty years after the use of the tracks had been abandoned, one of the lot owners built on that part of his lot included in the strip occupied by the tracks, and the owner of another lot filed a bill in equity to enforce the observance of the restriction. Held, that the land was no longer subject to the restriction, and that the defendant could use his land as he pleased. *Bangs v. Potter*, 135 Mass. 245 (1883).

In regard to this provision the court said in part: "These servitudes and easements were expressly limited to a railway; and though it would be a benefit to each lot to receive light and air through the space which was to be kept open for the railway, the benefits of light and air are incidents which result from the provisions for a railway, and are not provided for independently of the railway, and no servitude is imposed or easement granted for any purpose but the railway; and when the railway was abandoned, all servitudes and easements terminated, and each owner had the right to use the whole of his

lot for any purpose he pleased, without restraint by the 'terms of sale' or provisions in the deed."

A tract of land was conveyed without consideration with the following covenant in the deed: "Said land to be used for the purposes of fair grounds and driving park and for no other purpose, and to revert to said first parties, their heirs and assigns when abandoned by said second party for the purpose aforesaid." The grantee used the land in question for the purpose intended until 1902, at which time it ceased to hold fairs, and thereafter the buildings were permitted to fall into disrepair, some of them being allowed to fall down and the lumber of which they were built was carried away. After 1902 the grounds were used only for exercising horses by the secretary of the grantee, and some others kept and trained horses there; it was also used by a local driving club one season, and baseball games and football games, automobile races, and wild west shows were held thereon. In 1910 plaintiffs made a demand for possession of the land, and being refused, brought suit in 1911 to recover the possession. It was held that the facts showed an abandonment by the grantee of the land of the purposes for which it was granted, and that the plaintiffs were entitled to possession. *Estes v. Muskegon County Agricultural & D. Park Assn.*, ... Mich. ..., 147 N. W. 553 (1914).

§ 372. — general scheme.

In a general or neighborhood scheme, the burden follows the benefit. It is a mutual benefit accruing to all and to each which makes it inequitable to anyone so benefited to repudiate the burden to the injury of the others. If, therefore, the parties in interest, by express act or passive acquiescence, permit such violations of the plan or scheme as destroy, wholly or partly, the benefit therefrom, they have to a corresponding extent absolved each other from its burden. *Sanford v. Keer*, ... N. J. Eq. ..., 83 Atl. 225 (1912).

Where there has been no uniform observance of the restrictions and substantially all the land owners have so conducted themselves as to indicate an abandonment of the right to have the neighborhood kept to the standard established by the

original plan, and where the enforcement of the restriction against the defendant will not tend materially to restore to the district the character impressed upon it by the scheme, and the infraction complained of does not diminish the value of other estates, it would be inequitable and oppressive to compel at great loss a compliance with the restrictions. *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40 (1910).

The mere fact that a number of houses have been erected in violation of a building restriction imposed on all of the lots in a subdivision, does not show a general abandonment of the scheme of improvement, nor constitute such a change in the neighborhood as will release a grantee of one of the lots so restricted from the duty to observe such restriction. *Waters v. Collins*, ... N. J. Eq. ..., 70 Atl. 984 (1895).

In a district containing one hundred and fifty lots restricted to exclude flat buildings, two flat buildings were erected covering four lots some eight or ten years prior to the time in question and at a time when none other of the present owners of lots had purchased. Held, that such facts did not show an abandonment of the restriction as would preclude the present owners from enforcing them against another breach on different premises. *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808 (1913).

The owner of unimproved property divided it into lots, his "plan" being to sell the lots only for residence purposes. He sold several lots to A, the deed to which provided that "no business, manufacturing or other than dwelling houses shall be built upon said property." Subsequently he sold lots to other persons without any restrictions. A railway company purchased A's lots and commenced the erection of a street railway station thereon. Held, that by selling the remainder of the lots without restrictions, the original owner had put it out of his power to carry out his plan of using the property for residences only, and that he could not, therefore, enforce the restrictions against the lots he sold to A, as it was evident he had abandoned his original intentions. *Duncan v. Central Passenger R. Co.*, 85 Ky. 525, 4 S. W. 228 (1887).

Lots in a neighborhood were conveyed subject to a restriction that no building should be erected nearer than twenty

feet to the street line. More than one hundred and fifty conveyances were made with this restriction, but subsequently about one hundred of the purchasers had violated the restriction. Nothing was done to enforce observance of the restriction except that in 1898 a bill was filed seeking to enforce the same, but it was allowed to remain without trial until 1905, at which time suit was brought to enforce the restriction against the defendant in this case. Held, that the facts showed an abandonment of the original plan, and barred complainant of his right to enforce the restriction. *Chelsea Land & Imp. Co. v. Adams*, 71 N. J. Eq. 771, 66 Atl. 180 (1907).

Regarding this question the court said in part: "It may be that, in the judgment of the officers of this company, they thought it prudent to allow these people to violate these restrictions, because they were putting in this locality large and valuable buildings, which enhanced the value of the land remaining in the hands of the company. That may be a wise thing to do. I am not criticising them. But I think that all the persons occupying these lands are entitled to be treated alike, and this complainant company cannot undertake to waive violation of these restrictions in so universal a manner, as it is proved has been done here, and then undertake to enforce it against one other of their purchasers. Such a general consent to the non-observance of restrictive covenants amounts to an abandonment of the original intention and design with regard to restrictions. If the original grantor of one hundred and fifty lots by deeds, with a restriction as to building lines, allows two-thirds of the grantees to violate it without protest, it cannot enforce it against a single grantee, for the purpose of benefiting its remaining lands, for the grantee thus assailed is entitled to the common privileges accorded to other purchasers who are subject to like restrictions. It appears in this cause that the complainant obtained from certain of the purchasers of a part of the tract a release as to the restrictions, so far as a portion of the whole was affected, and thereafter, as to that part, changed the character of the restriction, and materially altered the scheme of the original plan, not only as to size of the lots, but as to the building lines. This change affected all the lot owners, and

cannot be confined by the original holders to a portion of the property, especially as, in this case, the changes relate to a part of the street upon which defendant's lands are located. This bill is not filed by individual lot owners, but on behalf of the holding company, owners of unsold portions, and because of its laches in so many instances is presumed to have abandoned the original plan as to restrictions."

§ 373. — immaterial violations as indicating.

Immaterial violations of restrictions do not necessarily show an intention to abandon the general plan, and are, in themselves, no defense to an action brought to enforce the observance of the restrictions. The violation, to indicate an intention to abandon the general plan or scheme of improvement, must ordinarily be material and such as to prevent the general plan relating to the restricted territory from being carried out, or at least to prevent the plan relating to that particular portion of the restricted territory from being carried out. The materiality of the violation is to be determined from the circumstances of each case. An open piazza, with slender columns at the corners, and enclosed for a space of about three feet at the bottom, and projecting from the second story of a dwelling a few feet beyond the line to which the erection of buildings was restricted, has been held to be an immaterial deviation. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

The violation of restrictions will not prevent their enforcement on the ground of abandonment if the violations are immaterial and such as do not prevent the general plan of improvement from being carried out. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

Where violations of a building restriction are insignificant in extent and number, it cannot be inferred therefrom that there has been an abandonment of the restriction. Acquiescence in trivial breaches of such a covenant does not conclude a complainant from relief in respect of one of a more important character. *Newberry v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752 (1909).

A few sporadic instances of the violation of restrictions

imposed under general plans, which violations have not been attacked, do not, in themselves, furnish conclusive evidence of an abandonment of the plan. *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911).

The fact that the main body of a few of the houses erected on a street extends within the restricted portion of the lots, including a storehouse and church, and that residents did not enjoin against the erection of such buildings, was not sufficient, as a matter of law, to show an abandonment on their part of the restriction which such buildings violated. *Seawright v. Blount*, 139 Ga. 323, 77 S. E. 152 (1912).

It has been held that the fact that complainant and other owners of property within a restricted district erected verandas, porches, and steps within the restricted portion of their lots, which have not materially interfered with or obstructed the right of view, was not sufficient, as a matter of law, to show an abandonment of the scheme of restriction, it not appearing that there had been a general change in the street, or the conditions surrounding it, rendering the restriction useless to the complainant and other residents. *Seawright v. Blount*, 139 Ga. 323, 77 S. E. 152 (1912).

The owners of property adjoining a city street covenanted with each other that a four-foot strip of ground in the front of their lots would be added to the sidewalk space and that such space should not be built on by any of the parties. More than twenty-five years prior to the institution of the suit in question steps were built on the four-foot strip leading to an opera house; steps were also erected on the strip leading to a Masonic temple; the front of a drug store in the opera house building was extended over and upon the steps leading to such building; showcases were permitted to remain on the strip, and near one end a building front had been extended over part of the strip. The testimony showed, however, that almost without exception the walls of the buildings and the projections which came to the street line, save the steps referred to, had been erected with reference to the line established by the agreement. This was the general rule with regard to property on the entire strip. Held, that under the circumstances, there was neither an abandonment nor abroga-

tion of such building restrictions by complainant, as it did not appear that any of the encroachments interfered in any way with their use and enjoyment of the property. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

The materiality of the violation of a restriction is to be determined from the circumstances of each case, and the question seems to be whether they are such as to indicate an abandonment of the original idea or plan and make its enforcement inequitable because of the changed condition of the property under restriction. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

§ 374. — where complainant is not affected by other violations.

The fact that the owner of property does not complain of the violation of a restriction by another or other owners, against whom he is, or, at least, was, entitled to have the restriction enforced, which violation does not materially affect him in the enjoyment of his property, does not preclude him from enforcing the restriction against an owner whose violation of it does materially affect him.

A complainant cannot be charged with having abandoned his rights under a restrictive covenant because he failed to interfere to enforce the covenant in a case in which he had no substantial interest to protect. *Brigham v. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185 (1908).

Where the restriction relates to the character or location of buildings, the passive acquiescence of a purchaser in breaches of the covenant by which he sustains no particular injury, does not deprive him of his equity to protection, where the breach immediately affects his enjoyment of his premises. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

For instance, the owner of property may enjoin the erection of a bay window by his next door neighbor in violation of a restriction, although he did not object to a similar violation of the restriction by owners farther away, which did not interfere with his prospect. *Payson v. Burnham*, 141 Mass. 547, 6 N. E. 708 (1886).

Where ten buildings were erected within a territory

restricted according to a general plan of improvement in violation of such restrictions, but only two of such buildings were within two blocks of plaintiff's property, plaintiff could not be charged with an abandonment of his right to enforce such restrictions. *Brigham v. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185 (1908).

The owner of property cannot be said to have acquiesced in certain violations of restrictions which did not interfere with his rights to the extent of amounting to an abandonment of his rights, in an action to enforce the observance of restriction in an instance where the violation would result in injury to his property. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912). Or, in the language of some of the cases, it is said that acquiescence in the breach of a restrictive covenant by other grantees will not deprive a lot owner of the right to enforce a restrictive covenant as long as it remains of any value to him.

A town site proprietor owning lots on various parts of an improved tract of ground, may be directly interested in violation of restrictive covenants imposed on such lots in any part of the entire tract, and acquiescence on his part may appropriately deny to him the equitable right to enforce the covenants, but a violation of such covenants at a point on the tract distant from the lot of an individual lot owner may be of no interest whatever to such owner, and cannot appropriately call for affirmative action on his part. *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675 (1909).

The English cases, as well as American, generally hold that a person entitled to enforce restrictive covenants may take no notice of violations not especially offensive to him without losing the right to enforce the restrictions in case of an especially offensive violation. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

§ 375. — where violations were according to popular interpretation of restriction.

Where open porches and bay windows were extended into the restricted portion of lots in accordance with a popular interpretation of the restriction in question, their erection in

this manner did not show an intention to abandon the general building line scheme. *Brigham v. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185 (1908). The fact that a number of buildings had been erected with the main body of each building located with reference to the building line, and with porches and bay windows extending over the line, indicates a popular interpretation of the restriction to that effect. If they had been erected under erroneous construction of the covenant, that fact is no evidence of an abandonment of the general scheme.

§ 376. — of one of several restrictions.

Acquiescence in the violation of one of a number of restrictive covenants imposed on the use of property does not necessarily show an intention to abandon rights under another of such covenants. Thus, where restrictions provided that no building should be erected within twenty feet of the front line of the property, nor within five feet of the side line of any lot, violations of the restriction relative to the side line of the property acquiesced in by complainant, did not show an abandonment of his rights under the restriction relating to the front line of the property. *Brigham v. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185 (1908).

In this regard the court said: "Whether a building is three or five feet from the side line of a lot is a matter of little concern to anyone except the owner of the adjacent lots in the immediate vicinity, and I cannot think it strange that this part of the covenant has not been strictly observed; but, whatever effect these violations of this part of the covenant may have against parties seeking its enforcement, I am unable to conclude that it should operate as a bar to the enforcement by complainant of those parts of the covenants which he now seeks to enforce."

§ 377. — as to part of restricted property.

It is competent for parties in interest to abandon the scheme of restriction as to part of their property, and retain it as to other portions.

Where there had been no uniformity in the use of a certain tier of lots in a tract of land, and restrictions imposed thereon

were not uniform, and no uniform building lines had been observed as required by the restrictions, and a great variety of business was being conducted on the lots, it has been held that any restrictions on such lots must be held to have been abandoned. *Thorburn v. Morris*, ... N. J. Eq. ..., 75 Atl. 757 (1910).

A restriction abandoned in part is not necessarily abandoned altogether, and where it is abandoned *pro tanto* only, and a material and beneficial part remains, it will be protected. *Ewertsen v. Gerstenberg*, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310 (1900).

Whether or not there has been a mutual abandonment of restrictions imposed upon the use of property is a question of fact rather than one of law, *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912), although, of course, certain facts when found may constitute an abandonment as a matter of law.

§ 378. Waiver.

It has frequently been held that acquiescence may often operate as a waiver of the right to enforce covenants restricting the use of property without any physical changes of a permanent nature having occurred in the property. But in all such cases it will probably be found that such substantial changes have been committed in the special conditions sought to be preserved by the covenant as to clearly indicate an intention on the part of the person entitled to enforce the covenant to relinquish the original purpose or scheme defined by the covenant, or that adverse equities have intervened by reason of failure to enforce the covenant.

Complainant purchased some five thousand acres of land for the purpose of establishing thereon a settlement of Hebrews. The enterprise was for the benefit of the Hebrew race, and not for profit. The tract was divided into building lots for residences and into garden lots. The general plan included the adoption of certain covenants to be inserted in all deeds, among which was a covenant as follows: "Also that no spirituous, malt, intoxicating or vinous liquors, preparations or substances in the nature thereof, shall be manufac-

tured, bought, sold or kept for sale as a beverage upon the premises above granted without the written consent first had and obtained of the party of the first part duly executed and proven under its common or corporate seal, in the same manner that conveyances of land are properly executed and proven in the State of New Jersey."

More than two hundred and fifty conveyances had been made at the time of the suit, and each conveyance contained this, as well as other uniform restrictive covenants. Suit was brought to enjoin defendants from continuing in the business of selling intoxicating liquors on one of the lots. It was shown in defense that liquor had been sold on the tract for a number of years in violation of law and the covenant in question, and that a wholesale liquor license had been issued for three years authorizing sale in a building on the tract. However, complainant had never lent even tacit sanction to any violation of the covenant, but had honestly tried to prevent such violation, and delayed filing suit to enforce observance of the covenant in hope that its violation could be otherwise stopped. Held, that there had been no waiver of right to enforce the covenant. *Woodbine Land & Imp. Co. v. Riener*, 72 N. J. Eq. 787, 65 Atl. 1004 (1907).

A waiver is the intentional relinquishment of a known right, involving both knowledge of the existence of the right and an intention to relinquish it. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 144 (1896), affirming 59 Ill. App. 581 (1895). The intention is the essential element involved. *Yeomans v. Herrick*, ... Mo. App. ..., 165 S. W. 1112 (1914).

There can be no waiver of rights under restrictive covenants in the absence of knowledge of facts upon which the claim of waiver is based. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157 (1912).

Where the owner of a tract of land sells it off in lots, with restrictions on the use thereof, he will lose his right in equity to enforce such restrictions against one grantee if he knowingly permits other grantees to violate the same restriction, the effect of which violation is to abrogate the purpose of the restriction and alter the general scheme intended to be con-

served by it. *Ocean City Association v. Chalfant*, 65 N. J. Eq. 156, 55 Atl. 801, 1 Am. & Eng. Anno. Cas. 601 (1903).

It is well settled that a plaintiff is not prevented from obtaining relief against the violation of property restrictions by the fact that he has not objected to a violation of the restrictions by some one in the neighborhood other than the defendant. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936 (1901); *Zipp v. Barker*, 40 N. Y. App. Div. 1, 57 N. Y. Supp. 569 (1899), affirmed in 166 N. Y. 621, 59 N. E. 1133 (1901).

Standing by and seeing the owner of another lot, which with plaintiff's lot were subject to similar restrictive covenants, build, without objection, a bay window overhanging the space restricted against buildings, was held not to constitute a waiver on the part of plaintiff of his right to enforce observance by defendant of such restrictive covenant. *Du Bois v. Darling*, 12 Jones & S. (N. Y.) 436 (1879).

Where an owner conveys a portion of his property by deed providing that upon breach of conditions or restrictions against the carrying on of a specified business thereon, the estate shall be forfeited, he waives the right to forfeiture by the granting of adjoining portions of the tract without any conditions or restrictions. *Brown v. Wrightman*, 5 Cal. App. 391, 90 Pac. 467 (1907).

Waiver of a right to the enforcement of restrictions contained in a deed may be shown by parol testimony. Estoppel may be shown in the same manner. *Union Trust & Realty Co. v. Best*, 160 Cal. 262, 116 Pac. 737 (1911).

§ 379. — illustrations of conduct amounting to waiver.

After a contract for the sale of land was made, the vendee, under the direction of the vendor's general agent, erected a house on the lot before the execution of the deed to him. Thereafter the vendor with full knowledge of the location of the house received payment on the purchase price of the land and made no objection, until long after it was completed, the deed executed, and the purchase price paid, that the building was in violation of any restriction. It was held that the vendor had waived any right to enforce the restrictions.

Union Trust & Realty Co. v. Best, 160 Cal. 263, 116 Pac. 737 (1911).

A., the owner of land divided into lots, sold one lot to B. with a provision in the deed that no other building than a dwelling should be erected thereon. B. sold the lot to C., who knew of the restriction, but the deed to C. contained no such covenant. A. mortgaged or sold all the other lots without any restrictions. C. commenced the erection of a stable on his lot, and A. applied for an injunction to restrain the same. The allegations of the petition showed that the restriction in the deed was to enable A. to carry out the plan of selling his property for residence sites, and the proof showed that he had abandoned said plan, or at least that by parting with the titles to the other lots to various and sundry persons without imposing any restrictions, he had not only rendered the plan impracticable, but impossible. It was held that injunction would not lie; the court saying: "In such a state of case as this the authorities seem to be uniform and conclusive to the effect that no injunction will lie; but the party must depend upon his remedy at law for any damage he may sustain by the breach of the covenants of his deed." *Duncan v. Central Passenger R. Co.*, 6 Ky. L. Rep. 426 (1884).

The lots of adjoining owners were subject to restrictive covenants prohibiting any building from being erected nearer than ten feet of the street line. One of the owners commenced the erection of a building with eaves and bay windows projecting into the restricted portion of the lot. The other owner notified him that he considered the erection of the bay windows in such a manner as a violation of the covenant, but made no other objections, and the building was erected with the bay windows eliminated and the eaves projecting over the building line. Held, that under the circumstances the plaintiff, owner of the adjoining lot, was not entitled to an injunction to require the removal of the eaves projecting over the building line, as the defendant was warranted in proceeding with the erection of the house in this manner after plaintiff had complained of the windows but made no objection to the eaves. *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492 (1912), affirmed in 81 N. J. Eq. 210, 86 Atl. 398 (1913).

In this respect the court said: "I am entirely clear that, under these circumstances, it would be unjust to the defendant for a court of equity by injunction to prevent the maintenance of the said cornice or eaves. It appears from the bill and proof, when the defendant had so far progressed with his building as to show that he intended to place bay windows in the front and to have a cornice or eaves projecting from the said front some three and a half feet, the complainants observe this situation and communicated to the defendant their objections to the existing plan of the defendant, and warned him that the bay windows were a violation of the covenant. They did not warn him with respect to, nor in any way call his attention to, the cornice or eaves. Under these circumstances I think the defendant was entirely justified in determining that the complainants did not object to anything in the existing situation other than that which they specifically pointed out and stated as their objection. And I think that the defendant was entirely justified then in acting upon that determination, and leaving the rest of the building as it was originally planned, eliminating the feature to which the complainants objected."

The complainant owned a large tract of land which it laid out as a seaside resort of a religious character. It incorporated in all the deeds of purchasers a covenant that no building should be used or occupied as a drug store without the written consent of the complainant association; also, that no business of any kind whatever should at any time be carried on on the Lord's day, commonly called the Sabbath or Sunday; nor should any act, matter or thing be done that is a desecration of such Lord's day; and that the land conveyed should be under and subject to the conditions, restrictions and regulations as may be made to insure the original purpose and intention of said association in securing the whole island as a Christian resort. Complainant brought suit to restrain defendant, owner of one of the lots subject to such restrictions, on which he conducted a drug store, from violating the restriction regarding the carrying on of business on Sunday. It was admitted that the defendant sold articles, soda water and like beverages from his drug store on Sunday, but his

defense was that the association had waived its right to enforce this covenant against him, because it had permitted violations of similar covenants by other grantees. The evidence showed that on Sundays three bath-house keepers had, for a number of years, conducted their business of hiring bathing suits and dressing rooms; that on Sundays meat and ice cream were delivered; that hacks ran, and livery stables hired out horses and vehicles; that cigar and fruit stores did business, and newspapers were sold on the street; that trolleys had run in the streets, and railroad trains ran through the city. The court held that some of these transactions must be put out of sight, because it did not appear that they were violative of the covenant. It did not appear how the railroads, hackmen and the paper venders became subject to the restriction. It also stated that in some of the other instances the violations were not brought to the knowledge of the officers of the association, and were not so frequent or of such character as to raise the inference that they must have known of them. Again, it appeared that there were attempts by actions at law and by prosecutions, to stop acts which were infringements of the covenant. On the other hand, the court stated, that it appeared that the officers of the complainant association had not used reasonable diligence in preserving the character of the association which the covenant was calculated to secure. The court further stated, that trolley cars and bath houses are undoubtedly attractive and important features of seaside resorts at all time; but if their operations on Sundays conflict with the covenant, they stand, in respect to the covenant, on the same footing as any other business; that it appeared that the trolley cars ran with impunity on Sundays, and that while the use of the streets may not have been a violation of the covenant, its power house, in which the energy which ran the cars was generated, was admittedly on land subject to the restriction. And again, the bath houses had been for years violating the covenant with increasing boldness and publicity. In the judgment of the court the complainant had waived its rights to equitable assistance, and its bill was dismissed. *Ocean City Association v. Chalfant*, 65 N. J. Eq. 156, 55 Atl. 801, 1 Am. & Eng. Anno. Cas. 601 (1903).

The owner of property, in conveying a portion thereof, inserted restrictive covenants in the deed which were applicable to a residential neighborhood, and had relation to the protection of the dwelling house occupied by the grantor on his remaining property. Subsequently his grantees of such remaining portion pulled down the dwelling house and converted the property to business uses. Held, that the advantages of the restrictions could no longer be claimed in favor of such property. *Deeves v. Constable*, 87 N. Y. App. Div. 352, 84 N. Y. Supp. 592 (1903).

In this relation the court said: "We are also of opinion that when the successors of the grantor in the deed tore down the dwelling and erected a business block thereon, which extended over the open space in front of the dwelling house to the building line on the northerly side of Seventeenth street, it amounted to an extinguishment to whatever easement had theretofore existed on the adjoining property. Such act was inconsistent with the terms of the restrictive covenant, its language and intention. It was a recognition of changed conditions, which had converted this street from a residential street and devoted it to business use. The building, which was erected upon this site, was itself devoted to business and was a conclusive act, and conclusively evidenced an intention upon the part of the successors in the grant to disregard and nullify the covenant which had been imposed for the enjoyment of the property as a dwelling."

A restriction in a deed of conveyance of a lot against the sale of liquor thereon is waived by the subsequent conveyance by the same grantor of adjoining premises without restriction, and such adjoining premises have been and are used for the sale of liquor; and it is not material that the omission of the restriction in the latter conveyance was a mistake. *Jenks v. Pawlowski*, 99 Mich. 110, 56 N. W. 1105, 22 L. R. A. 863, 39 Am. St. Rep. 522 (1893).

"Restrictions of this class," said the court, "are sustained upon the theory that a party has the right, in disposing of his property, to prevent such a use by the grantee as might diminish the value of remaining land, or impair its eligibility for other uses. But is there no mutuality in such agreements?

It certainly cannot be said that a grantor has the right afterwards to sell an adjoining lot without restrictions, and thereby diminish the value of his former grantee's property, and impair its eligibility for other uses, converting the locality into a saloon locality, and still be allowed to insist upon the restriction. It is no answer to say that the omission of the restriction in the deed to Lowry was a mistake. The consequences are the same to defendants. No proceedings have been taken to correct such mistake."

Equity will not enforce the forfeiture of an estate upon the breach of a condition in the deed providing that no liquor should be sold thereon, where the grantee makes such use of the premises for eleven years, and makes improvements adapted to that business, with the knowledge and without objection of the grantor. In such case equity will leave the grantor to his other remedies. *Lehigh Coal & Nav. Co. v. Early*, 162 Pa. St. 338, 29 Atl. 736, 34 Wkly. N. Cas. 501 (1894).

§ 380. — illustrations of conduct held not to amount to waiver.

The defendant purchased one of the lots in a tract of land in which all were subject to a restriction that no building other than a residence with the customary outbuildings should be erected thereon, and that such residence should be erected not less than a specified distance from the front line of the premises, and erected thereon a dwelling which violated such restriction. It was held that complainant could not be said to have waived his right to maintain an action on account of such violation by reason of the fact that before defendant bought his lot buildings had been placed on various other lots in the tract in violation of the restriction without objection on the part of complainant or other lot owners, where there was nothing to show that complainant was damaged by such other violations, or had any knowledge thereof until after the commencement of her action. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157 (1912).

Complainant was the owner of a dominant estate in favor

of which restrictions were imposed on the servient estate against the use of the latter for the sale of intoxicating liquors. A saloon was opened on the servient estate in May, and in May or June complainant drank beer in the saloon. It was shown that in May of the following year complainant refused to execute a written waiver or release of the restriction when requested to do so by the owner. Held, that no waiver was shown. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 144 (1896), affirming 59 Ill. App. 581 (1895). The fact that the owner did not regard that the restriction had been waived or its violation acquiesced in, by complainant by anything done prior to the time he requested complainant to sign a written waiver, is shown by the fact that he did attempt to procure a waiver, thereby treating the covenant as being in force. "It is not natural that appellee should unqualifiedly and firmly, on different occasions, after earnest persuasion and the offer of money consideration, refuse to release such restrictions in writing and at the same time verbally to consent to release the same without any consideration, when the tendency would be to depreciate the rental value of his property."

In an action to enjoin the violation of a building restriction by the construction of a stone arch projecting from the front of the building, it cannot be contended that complainant has waived his rights under such restrictive covenant by failing to prosecute other owners of lots subject to the same restriction who have built certain projections extending from some of the upper stories of their buildings. *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591 (1909).

A deed of conveyance of a lot provided that it should never be used for a store or saloon but kept for dwelling house purposes only. Held, that the restriction would be enforced in equity although prior to such conveyance the grantor conveyed adjoining lots without restriction, and had leased premises in the vicinity for saloon purposes. "The record," said the court, "does not disclose any waiver on the part of the complainant. On the contrary, it shows that his purpose in buying the land sold to the defendants was to prevent the erection of a saloon there, and to protect his store on the next corner

and his residence property in the next block from being depreciated in value by the proximity of a saloon." *Reilly v. Otto*, 108 Mich. 330, 66 N. W. 228 (1896).

Lots in a subdivision were conveyed subject to restrictions, one of which was that no building other than dwelling houses should be built within 25 feet of any street line. About 600 houses were erected in the restricted district, and all but 30 or 40 of them complied with the restrictions. The complainants used a portion of their property for business purposes, and there were a number of business houses in the restricted district built nearer than 25 feet to the street line. Held, that the erection of a building to be occupied by a drug store would be enjoined. *Stewart v. Stark*, ... Mich. ..., 148 N. W. 393 (1914).

The erection by the owner of a lot of a barn on the rear of his premises, which were subject to a building restriction prohibiting the erection thereon of any other than a single dwelling house, was held not to constitute a waiver of the restriction as to such lot so as to permit the erection on the rear of the lot of a store building. *Erichsen v. Tapert*, 172 Mich. 457, 138 N. W. 330 (1912).

Defendant purchased a lot with a restriction prohibiting the erection of any building within forty feet of any street line bordering on the property, and thereafter commenced the erection of a building in violation of such restriction. Several days thereafter one of the agents who had sold the property to defendant noticed that the excavation was being made rather close to the street, and called defendant's attention to the fact that the restriction called for forty feet from the side street, and defendant remarked that he certainly expected to live within the restriction. The following day the agent spoke to him about it, and asked him where the stakes were on the south side of the excavation, as they had been obliterated by the grader hauling the dirt out. Defendant did not point out where the south line of the excavation was, and the agent pointed out to him where the property line was, and told him that he must observe the restriction as to the forty feet on the south line. Defendant replied that he knew as much about those matters as the agent did, and knew where

to measure from. The agent spoke to him several times about being careful to observe the restriction, before the excavation was completed. Thereafter the agent noticed that the foundation wall had been put in and discovered that the distance from the side street was less than forty feet, and he thereupon went to defendant and told him that he was six or seven feet over the line, and defendant replied, "Well, I'll just stand you a lawsuit on that." The following day a written notice was served on defendant that the residence he was erecting on the lot did not comply with the restriction. Two or three days later the remainder of the purchase price of the lot became due, and defendant paid it, and received a deed from plaintiff in accordance with the terms of the contract, and containing a provision requiring that the restriction be observed. Defendant proceeded with the erection of the building in disregard of his covenant and the notice given him, and it then being definitely known that he would not observe the covenant, suit was brought to enjoin the erection of the building in violation thereof. It was held that there was no evidence to show an intention to waive or abandon such restriction, and the fact of plaintiff's accepting the balance of the purchase price and conveying the property after the commencement of the erection of the building in violation of the covenant, and the fact that there were other instances where other property owners had not observed the restriction in some particular, did not show an intention to the contrary. *Yeomans v. Herrick*, ... Mo. App. ..., 165 S. W. 1112 (1914).

Plaintiff and defendant took titles to their respective properties from a common grantor who imposed restrictions thereon in a covenant against the erection of a building within a certain distance of the front line of the premises, and against erecting certain specified buildings, among them a livery stable or private stable. It was held that the mere fact that the common grantor maintained a private stable subsequently conveyed to defendant, on which defendant erected a porch and bay windows extending into the restricted portion, and which adjoined the lots previously conveyed to plaintiff, and that the stable remained thereon until removed by defendant, without

any interference by plaintiff, did not constitute a waiver by plaintiff of his rights to enforce such restrictive covenant. *Du Bois v. Darling*, 12 Jones & S. (N. Y.) 436 (1879).

The fact that plaintiff attached an iron balcony to the front of his house projecting three feet four inches into the portion of the lot restricted against buildings, such balcony not being intended as an evasion of the covenant, or made otherwise than with a belief of the right to do so, did not constitute a waiver on his part of his right to enforce such restrictive covenant against the owner of adjoining premises. *Du Bois v. Darling*, 12 Jones & S. (N. Y.) 436 (1879).

§ 381. — kinds of breaches indicating waiver.

The question of waiver of the right to enforce a restrictive covenant by permitted violations of the covenant is dependent upon the character and materiality of the permitted breach.

A permitted limited breach may not conclude for all time in respect of a wider and more important breach. It may be observed also that a permitted breach may be of one of two kinds of covenants, one class respecting erections upon, or a permanent physical change in the property subject to restriction, and the other class respecting the use of property for certain occupations, without any physical changes in the property itself of a permanent character.

While the doctrine of waiver applies to both kinds of covenants, the propriety of the enforcement of the doctrine in particular instances may differ in each. This results from the fact that breaches of the first class usually permanently change the conditions which the covenant was designated to perpetuate, while breaches of the second class do not necessarily have that result. It is only when the person in whom the right to enforce the covenant resides has permitted such infringement of its provisions as results in alterations that cannot be corrected, or which it is manifest there is no intention to have corrected, that he is precluded from further enforcing the covenant. When such a person has permitted a covenantor to spend money in the erection of buildings which are violative of the restrictions, he is estopped from successfully suing in a court of equity for a mandatory injunction to restore the

statu quo, and the conditions having thus become permanently changed, he cannot sue another covenantor upon a similar covenant. When, however, the known breach consists in introducing upon the property some occupation interdicted by the covenant, and no considerable amount of money has been expended in fitting the property for a particular business, or the change of the business is such that it constitutes an inconsiderable alteration of the conditions which the parties had in view, then the waiver of the right to restrain other and more considerable breaches may not result. *Ocean City Association v. Chalfant*, 65 N. J. Eq. 156, 55 Atl. 801, 1 Am. & Eng. Anno. Cas. 601 (1903).

§ 382. — where complainant was not affected by other violations.

Where the owner of a lot of ground in territory uniformly restricted under a general scheme, in which restrictions were imposed on each lot for the benefit of all other lots within the territory, was not materially affected by several violations of such restrictions, he is not thereby barred of enforcing observance of such restrictions against the owner of a lot whose violation would materially affect him in the use of his property. *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899 (1907).

An owner may neglect to object to infractions of restrictions to some extent without losing his right to enforce the restrictions when they more clearly and seriously affect him. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 144 (1896), affirming 59 Ill. App. 581 (1895).

He does not waive or lose his right to enforce restrictions where their violation becomes especially and personally offensive and injurious to him and his property by reason of his previous omission to take notice of violations, and insist on the observance of the covenants, in cases not affecting him or his interests, or the locality in which his property is situated. *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726 (1913).

Where the owner of property within a restricted sphere has never violated such restrictions, or consented to, or authorized or encouraged their violation by others, he is not estopped

from restraining their violation when such violation is offensive to him, by the fact that he has not taken notice of violations less offensive to him. *Levy v. Halcyon Casino Hotel Co.*, 45 N. Y. Misc. 289, 92 N. Y. Supp. 231 (1904).

The benefits of a restriction, which prohibited buildings beyond a certain line and which had been violated by bay windows on several buildings extending over the line, are not waived by a failure to object to such windows if they do not materially affect plaintiff's convenience. The plaintiff may restrain the erection of a window over the line which materially interferes with his prospect. *Payson v. Burnham*, 141 Mass. 547, 6 N. E. 708 (1886).

The fact that complainant's neighbors have erected steps and ornamentations which project into the restricted space beyond the building line, does not estop him from complaining of the erection of the front wall of a house several feet beyond the building line. *Tripp v. O'Brien*, 57 Ill. App. 407 (1894).

Complainant cannot be said to have waived his rights under a restriction forbidding the erection of double houses where he permits the erection of such a house without protest in a different block from that in which his own land is situated, and which erection is over a quarter of a mile distant with a sixty foot street separating the blocks. *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726 (1913).

A complainant is not estopped to complain of a breach of a restrictive covenant merely because he acquiesced in its violation in a prior instance, where the former breach was slight and the latter flagrant and would greatly injure him. Especially is this true when the validity of the restrictive covenant at the time of the first violation was in doubt. *Misch v. Lehman*, ... Mich. ..., 144 N. W. 556 (1913).

It was here said by the court: "It is doubtless true that a continued acquiescence in successive breaches of the restriction would afford ground for the claim of estoppel because of the fact that the contemplated character of the property would thus be destroyed, and, that stage having been reached, it would be inequitable to grant relief. But we are of opinion that acquiescence in a single breach of the character of that

upon lot 29, under the circumstances disclosed by this case, is not such an act or failure to act as should be held to deprive these complainants of equitable relief. The true rule seems to be that, even after one or more breaches, equity will grant relief if the restriction can be shown to be of value to complainant, and such breaches have not resulted in a subversion of the original scheme of development resulting in a substantial, if not entire, change in the neighborhood."

§ 383. — as to part of estate.

It has been held in England that the waiver by the covenantee of a covenant respecting the use of a distant part of his estate did not deprive him of the right to enforce a similar covenant as to a portion of his estate near by. *German v. Chapman*, L. R. 7 Ch. Div. 271, 47 L. J. Ch. 250, 37 L. T. Rep. 685, 26 Wkly. Rep. 149 (1877).

In this respect the court said: "Then it is said that there has been a waiver of this covenant on a small piece of land—part of the same estate at some distance off; and therefore that the whole covenant is at an end. It is not very convenient to have such a question as that raised merely upon a casual answer given on cross examination. It is nothing more than this: that when the witness is in the box he is asked, have you not waived something? and he said he had waived a similar covenant as to a piece of land at some distance off in another corner of the estate. Then it is said, 'You having done that, notwithstanding the covenants which were entered into with other people in subsequent grants, the whole thing is at an end.' It would be a monstrous thing, if it were the rule of this court, that, upon such an estate as the Westminster estate in London, every one of the houses in Belgrave square and Eaton square are freed from any restrictive covenant of the kind because in some remote alley or back street upon the same estate somebody or other has been permitted to do something which is prohibited by his covenants. It can never be the meaning of those cases that such conclusions be arrived at. . . . I think it would be a monstrous thing to say that nobody could do an act of kindness, or that any vendor of an estate who had taken covenants of this kind

from several persons could not do an act of kindness, or from any motive whatever relax in any single instance any of these covenants, without destroying the whole of the effect of the stipulations which other people had entered into with him."

§ 384. — by grantor as affecting grantees.

Where a tract is subdivided and improved according to a general plan, and in the deeds of conveyance restrictions are imposed upon the use of the lots, no subsequent failure of the grantor to enforce the observance of such covenants in behalf of his remaining unsold lots can operate to destroy the right of one of the grantees to enforce them in behalf of his lot. *Brigham v. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185 (1908).

He may thereafter waive his own right to enforce such restrictions, but he cannot affect the rights of the various grantees of such lots to enforce the restrictions for their own benefit. *Ivarson v. Mulvey*, 179 Mass. 141, 60 N. E. 477 (1901).

The owner of a number of lots conveyed them separately by deeds imposing certain restrictions on their use. There was nothing to show that there was any general scheme or plan of improvement. Held, that it was no defense to an action to enforce the observance of the restrictions by the owner of one of the lots, that the grantor had waived the restrictions by permitting grantees of other lots to disregard them. *Haines v. Einwachter*, ... N. J. Eq. ..., 55 Atl. 38 (1903).

In this respect the court said: "In this case each grantee accepted his deed with the particular restrictions therein recited, imposed upon the lot thereby conveyed. Nothing shows that Mr. Starr agreed, expressly or impliedly, to impose like restrictions upon other adjoining or neighboring lots which he might sell. In truth, he varied or omitted the restrictions in several cases, and apparently dealt with each lot as a separate and unrelated property. The fact that he imposed the same restrictions on a number of lots is not sufficient, of itself, without other allegation or proof, to show that there was any general plan of improvement to which these restrictions related. It is, therefore, no answer to this suit to enforce the restrictions imposed upon the defendants' lots that they

should say that Mr. Starr has waived the enforcement of, or omitted to impose, like restrictions elsewhere."

§ 385. Limited or restricted waiver.

A lessor may give his consent that the leased premises be used for some purpose prohibited by the express terms of the lease. But such a consent upon the part of a lessor that a third party may occupy the leased premises for a specified business under the lessee, who is to be responsible for the rent, constitutes only a restricted waiver of conditions not to sublet or carry on any other than the kind of business to which the lessee is restricted by the lease, and applies only to such third person and the specified business. *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N. W. 47 (1890).

A covenant not to assign or sublet leased premises without the consent of the lessor is frequently inserted in a lease, and is regarded as a fair and reasonable covenant. But a license once given removes the restriction forever, as the condition is treated as entire, and therefore not capable of being waived or released as to part; but in order to have that effect it must be such a license as is contemplated in the lease; that is, if the lease provides that the license shall be in writing, an oral license is not good. "It is not to be understood, however, that this written stipulation not to sublet unless by consent of the lessor, in writing, may not be waived by an oral agreement; and such is not the contention of the counsel for the complainants here. The agreement to waive the condition as to Sprague, however, was not a waiver of the condition in the lease as to other parties, or for the carrying on of other business not contemplated by the lease, or the business to be carried on by Sprague. The consent that Sprague might enter and conduct a business of selling small musical instruments and sheet music was a restrictive waiver of the condition, and applied only to Sprague and the business to be carried on by him. It gave Michell no right to lease to any other party, or to carry on a different business; and Sprague certainly could gain no greater rights than Michell had. The terms of the lease were not waived, but a license given to Sprague to enter and carry on that particular business."

A lease provided that the demised premises shall be used "strictly as a private dwelling, and not for any public or objectionable purpose," and contained a renewal clause. In an action to compel specific performance of the renewal clause, it was held that the use of the premises as a boarding house constituted a defense to such action, as the same was in violation of the terms of the lease, and the fact that the lessor had consented that the premises be used for sleeping rooms in connection with a girls' school did not constitute a waiver of such covenant. *Gannett v. Albree*, 103 Mass. 372 (1869).

In this respect it was said by the court: "The consent of the lessor that the plaintiff might occupy and use the house himself, in connection with his school for young ladies, cannot fairly be construed as a general or absolute waiver of the limitations as to the nature of the occupation. It is not the case of a condition which, when once dispensed with, is discharged for all purposes, and cannot be revived, but of a covenant which can be modified by consent. The lessor might be willing to consider such a use of the house as not an entire departure from its intended character of a private dwelling, and not an appropriation to a public or objectionable purpose. But its conversion into a public boarding house is an entirely different matter."

§ 386. Acquiescence.

Whether the right to equitable relief, in respect to the violation of restrictions on the use of property, is affected by acquiescence depends upon the circumstances of each case. *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476 (1892).

Where a tract of land is laid out and improved according to a general plan, the question whether the owner of a single lot is barred of his right to enforce observance of certain restrictions imposed on all of the lots on account of acquiescence of their violation, must be considered in regard to the effect of such violations on his lot. *Brigham v. Mulock Co.*, 74 N. J. Eq. 287, 70 Atl. 185 (1908).

"It would scarcely be possible," said the court, "for any

single violation of the covenants to occur without the interests of the original land company being directly affected; but the owner of a single lot may have no concern whatever in a violation of the covenants on the part of the tract distant from his lot. I am convinced that any claim of bar asserted against the rights of an owner of a single lot by reason of acquiescence in the violation of restrictive covenants of this nature must be measured by the relation of the asserted violation to the individual lot."

One entitled to the benefit of restrictive covenants may allow to pass unnoticed violations not especially offensive to him without losing his right to enforce the covenant in case of an especially offensive violation. *DeLima v. Mitchell*, 49 N. Y. Misc. 171, 98 N. Y. Supp. 811 (1906).

Where the restriction relates to the character or location of the building itself, the passive acquiescence of a purchaser in breaches of the covenant by which he sustains no particular injury, does not deprive him of his equity to protection, where the breach immediately affects his enjoyment of his own house. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

The fact that the breach of a restrictive covenant by an owner of land on one street affects very slightly the property of an owner on another street, even where they are within the same general plan of improvement and are located on adjoining parallel streets, acquiescence therein by the latter owner does not indicate an intention to acquiesce in the violation of the restriction by owners of land adjoining the same street as his. In a New Jersey case in which this question was raised, the court said: "As to alleged violations on other streets and avenues, my view is that, even if proved, they are not material in this case, as the restrictions on each avenue, in a general plan of this kind, must be considered as adopted with special reference to each avenue and its improvement, and the rights of purchasers on one avenue, who have in good faith bought and built according to its restrictions, are not impaired or affected by acts of the vendor or other purchasers relating to the then existing restrictions on other avenues. As to the alleged violations of the restrictions on Allen avenue,

they must be material and such as to prevent the general plan relating to that avenue from being carried out." *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

Infrequent violations of a restrictive covenant not generally known or acquiesced in by plaintiff or residents within the restricted territory, will not prevent an enforcement thereof. *DeLima v. Mitchell*, 49 N. Y. Misc. 171, 98 N. Y. Supp. 811 (1906).

Where the owner of a tract of land sells the same in building lots and takes from each purchaser a covenant to build only in a specified manner, permits, without interference, material breaches of the covenant by some of the purchasers, he cannot thereafter obtain an injunction to compel another purchaser to observe the same covenant. It was here declared that there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others; nor in the case where the breaches have been committed before the defendant became a purchaser, and executed the deed of covenant. *Peek v. Matthews*, L. R. 3 Eq. 515 (1867).

A building estate was subdivided into lots, and sold to different purchasers, each of whom covenanted with the vendors and with the purchasers of the other lots not to build a shop on his land, or to use his house as a shop or to carry on any trade therein. A purchaser of one of the lots, who occupied his house as a private residence, brought suit to restrain another purchaser from using his house as a beer shop. The complainant had known for three years before he commenced the action that the defendant was using his house as a beer shop, and had himself bought beer at the place. There was evidence that some of the other houses had been used for shops. It was held that plaintiff had lost his rights to enforce such covenant by acquiescence in the acts of the defendant. *Sayers v. Collyer*, L. R. 28 Ch. Div. 103, 13 Eng. Bul. Cas. 101 (1884).

B. demised a plot of ground adjoining his dwelling house for building purposes for three lives and thirty-one years at a specified rental per annum. The lease provided that the tenement to be erected thereon, adjoining B.'s house, should

be "built fit for a private family and no other, under a penalty of ten pounds yearly additional rent, unless the said B. should convert his own house to any public use." Two houses were built on the premises, and subsequently the defendant purchased the one immediately adjoining B.'s premises at a public auction and proceeded to convert it into a public house. The other of the two houses on the demised premises had been used as a public house at the time in question for forty years without any objection from B., although B.'s own house had always remained a private dwelling. It was held that the ten pounds stipulated in the lease constituted a penalty and not liquidated damages, and that there was nothing to establish acquiescence on the part of the plaintiff who had no power to prevent the second house being turned into a shop, and injunction was issued to restrain the use of the house immediately adjoining B.'s premises as a public house. *Bray v. Fogarty*, Ir. Rep. 4 Eq. 544, 18 Wkly. Rep. 1151 (1870).

It was held in this case that the objection that the second house was being used as a public house was of no avail, as the covenant was against a public house immediately adjoining B.'s residence.

§ 387. — restriction for benefit of grantor or his property exclusively.

Where a grantor exacts restrictive covenants of a number of his grantees for his exclusive benefit, he is master of the situation in this respect and may release one or more of the grantees from their covenants, or acquiesce in their violation of them, and enforce observance of similar covenants by other grantees.

Where a restriction is imposed on a lot for the exclusive benefit of another lot, the fact that the owner of the dominant lot acquiesced in the violation of similar restrictions imposed on other lots in the vicinity, does not deprive him of the right to enforce observance of the covenant in question so long as it remains of any value to him. *Lattimer v. Livermore*, 72 N. Y. 174 (1878).

"Plaintiff is not suing for the breach of a covenant given for the common benefit of plaintiff and defendant. She sues

the defendant upon a covenant contained in his deed for her exclusive benefit. If all the prior grantees of Hurry should violate their covenants, it would not release defendant from the performance of the covenant contained in his deed, so long as it remained of any value to the plaintiff."

But where the owner of a dominant estate in favor of which restrictions were imposed on other lots so that the dominant estate might have "freedom of light, air and vision," has made or permitted permanent erections which substantially intercept the air, light and vision to and from the dominant estate, the easement is thereby extinguished. *Lattimer v. Livermore*, 72 N. Y. 174 (1878).

§ 388. — in slight violation does not justify greater violation.

Although a complainant may lose the right to enjoin a defendant from violating restrictions imposed on the use of his land by acquiescence in its use for business for a number of years, still such complainant may enforce observance thereof to prevent an extension of such business. *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111 (1907).

In this respect the court said: "But it seems to me that if the complainant's right is to be regarded as lost through acquiescence, his acquiescence can only be deemed to extend to the business as it has been conducted in the past—not to an increased business where more steam or other power may be employed; where more teams may be used, and more noise and vibration result. The erection of this store house and the equipment of it in the manner proposed, will give an opportunity for a considerable enlargement of the output within the building in which the manufacture is conducted. I think, therefore, that the defendant is, under the circumstances, entitled to an injunction to restrain an extension of the business in this building or on the lot on which it stands."

It has been held that acquiescence in the erection of noxious works in violation of restrictive covenants, while they produce little injury, does not warrant a subsequent extension of them to an extent productive of great damage. *Bankart v. Houghton*, 27 Beav. 425 (1860).

In the same case it was held that the fact that one is estopped from enjoining the violation of such a covenant by acquiescence does not necessarily bar his right of recovery of damages in an action at law. The last cited case was a suit for an injunction to prevent, on the ground of acquiescence, a party injured by copper works from enforcing a judgment recovered by him for damages at law. The injunction was refused. In this respect the court said: "In my opinion, it is unnecessary to consider that question, for, upon the fullest concession to the plaintiff of the truth of all the facts he alleges, his case wholly fails on the merits, and the facts on which he relies do not justify the legal inference he attempts to draw from them. The roasting furnaces are said to be those which principally produce the injury. The original number of roasting furnaces was in all, I think, three only. In 1853 they were increased to seven, and since the trial at law another has been added. The evidence shows, that it was not till 1853 that any damage was sustained from the works, which was then but slight. I think it impossible to be reasonably contended, that, because a man has acquiesced in certain works which have produced little or no injury, he is not afterwards to have any remedy, if, by the increase of the works, at a subsequent period, he sustains a serious injury. The highest it can be put is, that he assented to what was done and to the consequences that were necessarily to be derived from that, but no further. The consequences of going further would be most injurious, and would be unwarranted by any authority that I am aware of. It would follow, that a partial obscuration of ancient light, if assented to, involved a consent to their total obscuration, and that any easement assented to might be increased at the pleasure of the grantee, provided it could be shown that the increase was only a probable consequence of the use of the easement, if found beneficial. But I do not assent even to the extent to the first limited statement of the proposition. It may well be, that a person's assent is given under an erroneous opinion and view and in ignorance of the consequences. Is that mistake of fact to bind him from thenceforward and forever? I think not. The court holds, in cases of election, that a man is not to be considered bound by

an election which he has made in ignorance or mistake of the real facts of the case."

The fact an owner chooses to relinquish part of his easement does not deprive him of the whole. *Lattimer v. Livermore*, 72 N. Y. 174 (1878).

§ 389. — in violation of one of several restrictions.

The right to enforce observance of one restrictive covenant in a deed is not necessarily affected by acquiescence in the violation of another and distinct covenant as to the use of the same lot of ground and contained in the same deed.

Complainant may acquiesce in the violation of a restriction requiring that no buildings except dwellings shall be erected on certain lots, and retain his right to enforce observance of a restriction requiring the buildings to be of not more than a specified depth. *Lattimer v. Livermore*, 72 N. Y. 174 (1878).

In this case it was said by the court: "Plaintiff did not object to the change from dwelling houses to a hotel, except in the most general way. It may be said that she has acquiesced in the change, and that she cannot now enforce the covenant which required the front of the lots to be occupied by genteel dwelling houses. But such acquiescence does not deprive her of her right to enforce this, an entirely distinct covenant. Notwithstanding the violation of other covenants permitted or acquiesced in, she can enforce this so long as it is of any value to her. The simple fact that since the deeds were given by Hurry, the streets in the vicinity of this block have ceased to a large extent to be occupied for genteel dwelling houses, interposes no obstacle to the relief sought by the plaintiff. If by the change in the surrounding circumstances this covenant had ceased to be of any substantial value to the plaintiff, she would not be permitted in equity to enforce it, simply to annoy and damage other people. But so long as her house is occupied as a dwelling house, and the locality remains suitable for dwelling houses, and this covenant remains of substantial value to her, and she has in no way extinguished or released her easement, she must be permitted to enforce it."

§ 390. Estoppel.

Generally speaking, the principles of estoppel applicable in defenses of actions seeking to enforce observance of restrictive covenants, may be roughly stated to be that, when one person by his acts or words knowingly induces another to assume burdens which he would not otherwise have undertaken, the former person is estopped to take position or do acts to the prejudice of the latter that are inconsistent with the acts or words relied upon. *Woods v. Lowrance*, 49 Tex. Civ. App. 542, 109 S. W. 418 (1908).

Mere silence and inaction on the part of a complainant in an action to enforce the observance of a restrictive covenant cannot amount to an estoppel, except where such silence or inaction amounts to fraud. *Miller v. Klein*, ... Mo. App. ..., 160 S. W. 562 (1913).

The complainant in a case was held not to be estopped from asserting her rights under a building restriction merely because she saw material placed upon the premises with which to build, and the digging of a trench as a foundation within the restricted area, before any wall of the building was actually erected within it. *Seawright v. Blount*, 139 Ga. 323, 77 S. E. 152 (1912).

One grantee who had knowledge of the restrictions in the original deed, allowed another grantee, who was ignorant of the restrictions, to proceed three months with the erection of a house, and the expenditure of a large sum of money thereon, without objecting to its location, although he passed within a few feet of the work daily. Held, that his conduct did not amount to a legal estoppel to object to the house as violating the restrictions, if the restrictions were created for his benefit. *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506, 14 Ky. L. Rep. 502 (1892).

A purchaser at a partition sale who knew that he purchased the property subject to restrictions, was as between himself and other purchasers of portions of the property subject to like restrictions and taking with like notice, bound thereby as by mutual agreements, and he cannot thereafter assert that the court lacked power to require the premises to be sold sub-

ject to such restrictions. *Pagenstecher v. Carlson*, 146 N. Y. App. Div. 738, 131 N. Y. Supp. 413 (1911).

In this respect the court said in part: "The purchasers, therefore, bid, knowing that each would take subject to such covenant, and the effect of the transaction was that they agreed as among themselves to be mutually bound by it. The consideration, therefore, was the mutual covenant of each, and it is quite unnecessary now to decide whether the court would approve of such a provision in a decree in partition if the point were raised on an appeal by one of the parties to the suit."

The owner of a lot contemplated erecting a dwelling thereon for his own use, but before fixing the location thereof, he consulted the owner of adjoining premises as to the probable use thereof, and was assured by him that the adjoining premises would not be used for a feed stable and wagon yard. Relying upon these representations, the owner erected a dwelling at considerable cost. Subsequently the owner of the adjoining premises threatened to erect a feed stable and wagon yard on his premises within sixty feet of the other's dwelling house. This would, according to the statement of the latter, render his home unfit for habitation. There was a preliminary injunction issued upon the filing of the application, but upon demurrers being filed thereto the same was dissolved. It was held that the acts alleged in the petition constituted a clear estoppel in pais. *Woods v. Lowrance*, 49 Tex. Civ. App. 542, 109 S. W. 418 (1908).

In this respect the court said: "Assuming as true the allegations of appellant's petition, as we must for the purpose of the demurrers, at and before appellant fixed and erected his home at considerable outlay in money, he secured a specific representation and promise of appellee Lowrance that the latter's adjoining lots should not be used for the objectionable purposes specified in the petition. Thereby appellant was induced to act as he did, and we can scarcely imagine a clearer instance of an estoppel in pais. We conclude that the court erred in dissolving the injunction for want of equity in the bill, and that the judgment must be reversed therefor."

The owner of two adjoining lots, on one of which was his

residence, conveyed the second with the restriction or reservation, that no building shall be hereafter erected thereon within ten feet of the easterly line of the grantor's residence lot. Subsequent owners of the first lot had no actual knowledge of the restriction, but only constructive knowledge due to the recorded instrument. The owner of the second lot erected a building within ten feet of the other lot. When it was partly finished, the fact of the restriction came to the knowledge of the parties. Held, that the owner of the first lot was not estopped from asserting his rights under the restriction, although he had seen the building erected without objection. *Herrick v. Marshall*, 66 Me. 435 (1877).

"The plaintiffs did not sleep upon their rights. The court finds that they asserted them as soon as they had the means of substantiating them and that the defendant paid no heed to their claim. The plaintiffs might well be ignorant of what was included in the grant to them of 'the appurtenances' to their lot. But the defendant was bound to know their rights by the reference in his own deed to that of former grantors and those therein contained. His means of actual knowledge of the restriction were fully equal, to say the least, to those of the plaintiffs, and he cannot complain of any laches on their part. The case does not indicate anything like license or abandonment on the part of the plaintiffs and it is plainly not within the principles of equitable estoppel by matter *in pais* which the defendant invokes."

§ 391. — complainant must have knowledge of facts.

There can be no estoppel invoked against complainant in an action to enforce the observance of restrictive covenants, unless there is proof of his actual knowledge of the violations of the covenants which are set up as constituting an estoppel. Mere silence and inaction on his part could not amount to an estoppel, except where such silence or inaction would amount to fraud. *Miller v. Klein*, ... Mo. App. ..., 160 S. W. 562 (1913).

§ 392. — as between landlord and tenant.

Where a landlord stands by and allows his tenant to expend large sums of money in valuable and lasting improvements,

without objection or inquiry as to the tenant's intention in respect to the violation of a restrictive covenant, he is estopped to assert a forfeiture of the lease because of such improvements, where no substantial damage results from the improvements. *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076 (1896).

§ 393. — as to one of several tenants in common.

A tenant in common cannot do jointly with his co-tenant what he would not be allowed to do individually in connection with the use of the joint estate. And where he is estopped from doing a particular act on the land or making a particular use thereof as against the owner of adjoining premises, he cannot do so jointly with his co-tenant. *Woods v. Lowrance*, 49 Tex. Civ. App. 542, 109 S. W. 418 (1908).

§ 394. Laches.

Relief in equity in cases in which the enforcement of building restrictions is sought is granted only when sought with promptness, and where active diligence has been exercised throughout respecting matter of complaint. Conscience requires that one should not stand by in silence, while another makes considerable expenditures in good faith under an assumed right, and then ask a court to enforce compliance with restrictions at great loss, when reasonable notice or other appropriate action might have prevented the wrong complained of. *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40 (1910); *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912); *Thompson v. Diller*, 146 N. Y. Supp. 438 (1914); *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048 (1909); *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492 (1912), affirmed in 81 N. J. Eq. 210, 86 Atl. 398 (1913).

Where complainant stands by and sees the erection of a building in violation of a restrictive covenant, he will not thereafter be heard to complain of the violation. *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048 (1909).

Laches in a party seeking to enjoin the violation of restrictive covenants is not excused on the ground that the injunction sought is to prevent the doing of business on Sun-

day. *Ocean City Association v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914 (1898).

Equity requires that a complainant shall have been diligent in the exercise of his rights under restrictive covenants, and acquiescence in a violation of such a covenant is often sufficient to defeat complainant's right to enforce observance thereof, since every relaxation permitted amounts, *pro tanto*, to a disaffirmance of the obligation. *Russell v. Harpel*, 20 Ohio Cir. Ct. Rep. 127, 10 O. C. D. 732 (1900).

In referring to this question the court in the case cited said: "Having permitted a house on the other side of this lot to be erected within fourteen feet of the street, and having permitted, without objection, sixteen houses in this block to be erected nearer to the street than twenty feet, we think it would be unjust and inequitable and unconscionable to now permit her to enjoin this defendant from building his house, under all these circumstances, any nearer to the street than twenty feet. The house on the other side of plaintiff's lot being to within fourteen feet of the street, for defendant to properly enjoy his lot, it is necessary for him to bring his house out to some extent."

The party beneficially interested in the enforcement of a restrictive covenant cannot repose upon any notice which he may give or the defendant may have otherwise received of the existence of the restriction. *Island Heights Assn. v. Island Heights Water Power, G. & S. Co.*, ... N. J. Eq. ..., 62 Atl. 773 (1906).

It has been said that in every case of this sort the party injured is bound to make immediate application to the court in the first instance, and he cannot permit money to be expended by a grantee, even though he has notice of the covenant, and then apply for an injunction. *Ocean City Association v. Schurch*, 57 N. J. Eq. 268, 41 Atl. 914 (1898).

Where complainant, owner of a dominant estate, stood by and allowed a stable to be erected on the servient estate in violation of a property restriction, equity refused to require its removal. *Whitney v. Union R. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858). In this respect the court said: "It is very clear that a suit in equity to compel a compliance

with such stipulations concerning the use of property must be seasonably commenced, before the persons in possession of the estate have expended money or incurred liabilities in erecting buildings or other structures on the premises. It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights, and thereby inflict loss and damage on parties acting in good faith. In such cases a prompt assertion of right is essential to a just claim for relief in equity."

There is no hard and fast rule as to what constitutes laches. If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations, or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid to the establishment of an admitted right, especially if an injunction is asked. It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose by the word, silence or conduct of the plaintiff that there was no objection to his operations. Diligence is an essential prerequisite to equitable relief of this nature. Quiescence will be a bar when good faith requires diligence.

So long, however, as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches. Upon the discovery of infringement of rights, such reasonable expedition is required in their prompt assertion as is consistent with due deliberation as to the proper means for relief. On the other hand, one who openly defies known rights, in the absence of anything to mislead him or to indicate consent or abandonment of intent to impose on the part of others, is not in a position to urge as a bar failure to take the most instant conceivable resort to the courts. After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrong-doer from delay, there

is not the same imminent necessity for the early enforcement of demands as exist before conditions have become fixed. Mere lapse of time, although an important, is not necessarily a decisive consideration. Within the somewhat flexible limitations of these general rules, what may be laches in any case depends upon its peculiar facts. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910).

Laches in a land owner is imputed to his grantees and all claiming through him, and whenever he would be barred from enforcing observance of restrictive covenants by laches his grantees are equally barred. *Trout v. Lucas*, 54 N. J. Eq. 361, 35 Atl. 153 (1896).

§ 395. Illustrations of conduct held to amount to laches.

Where complainants informed themselves of the fact that a proposed building would be in violation of a restrictive covenant directly after the foundations therefor had been laid, and on October 31, 1911, or the day following, their counsel wrote a letter to the defendant, calling his attention to the erroneous location of his building, and a considerable correspondence ensued between that time and the filing of the bill for an injunction on December 18, following, and in the meantime the construction was going forward, and until the date of the filing of the bill no proceedings were taken to enjoin construction, it was held to have been the duty of complainants, under this state of facts, to act immediately after they had ascertained what the situation was, and that they were estopped by laches by enjoining the maintenance of the house in violation of the restriction, the house being half done before legal proceedings were commenced. *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158 (1913).

In a suit to enjoin the violation of a restrictive covenant prohibiting the erection of buildings on the premises in question fronting on a certain street, it appeared that the contract for the erection of the building complained of was made on September 18, 1913; that the building was to cost \$19,281; that during the latter part of September, 1913, all persons passing the building could see that it did not conform to the restriction, but faced on the prohibited street; that thereafter the

work on the building progressed steadily; that none of the plaintiffs made objection to the violation of the restriction until November 8, 1913; that no notice was given to the builder, one of the defendants, until November 11, 1913, at which time the building was largely completed, and there had been expended upon it the sum of \$7,000; that one of the plaintiffs had knowledge that work was being done on the building for five weeks prior to November 13; that another had such knowledge by the first week of October, and that the other plaintiff knew about it in the middle of October. Held, that plaintiffs' right of action was barred by laches. *Coates v. Young Women's Christian Assn.*, ... Pa. St. ..., 91 Atl. 863 (1914).

A land company which had divided a tract of land owned by it and conveyed parcels thereof with certain restrictions as to its use, waited three years after the erection of a water works on part of the land before attempting to restrain its maintenance thereon. In a bill filed for that purpose it alleged that its secretary had remonstrated with the promoter of the water works company against such location of the works, but it did not allege that it owned any property injuriously affected by the works, nor that any of the purchasers whose lots were injuriously affected had petitioned complainant for relief. Held, that complainant was barred from proceeding with the action by its laches. *Island Heights Assn. v. Island Heights Water Power, G. & S. Co.*, ... N. J. Eq. ..., 62 Atl. 773 (1906).

Plaintiff sought to enjoin the maintenance of certain structures on an adjoining lot, in violation of restrictions imposed thereon in a conveyance executed in 1825. The structures complained of, however, had been upon the lot many years before the filing of the bill, and were in plain view. It was held that the court would not enjoin the maintenance of such structures, as complainant had been guilty of laches. *Orne v. Fridenberg*, 143 Pa. St. 487, 22 Atl. 832, 24 Am. St. Rep. 567 (1891).

§ 396. Illustrations of conduct held not to amount to laches.

Complainant could not be charged with laches in the

enforcement of his rights under a restrictive covenant prohibiting the servient estate from being used for the sale of intoxicating liquors, where the facts were that a saloon was opened on the premises in question and operated during a part of the months of May and June, but was then enjoined by other parties, with whom the owner of the premises had agreed not to run a saloon for five years within a radius of one mile of such premises, and the premises were again used for saloon purposes on July 19, of the following year, but in less than two months thereafter, namely, on September 13, of that year, complainant filed a bill to enjoin the violation of the covenant. *Starr Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 144 (1896), affirming 59 Ill. App. 581 (1895). As the acts constituting the violation of the restriction were enjoined by others, it was unnecessary for complainant to take proceedings of his own for the purpose of stopping it.

One entitled to have restrictions on property enforced for his benefit has been held not to be guilty of laches where he commenced suit to enjoin the erection of a building which constituted the violation before the improvement was completed. *Johnson v. Robertson*,...Ia...., 135 N. W. 585 (1912).

In an action to enforce observance of restrictions in respect to a building which was constructed about the middle of May of one year, and action was not brought until the following March, it was held that the plaintiff was not guilty of laches where it was found that the delay was largely due to the interference of a mortgagee of the defendant's lot, who was originally joined as a defendant in the suit, and who afterwards dissuaded the counsel selected by the plaintiff from acting for him, and where it appeared that the plaintiff was not aware of the defendant's intention to violate the restrictions in question until the building was almost completed, and part of the delay was due to the lapse of time during which the plaintiff who had discovered the infringement consulted an attorney and the other plaintiff, who was out of the state. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910).

Where complainant first learned of certain building operations, which were in violation of a restrictive covenant and

which had been carried on for about six weeks in such a way that complainant did not have any actual knowledge of the violation of the restrictions, and where, a few days after discovering that such building operations would constitute a violation of the covenant, he communicated with the person violating the same, and the operations were stopped, and he commenced a suit in equity to enjoin such operations about two months later, a finding that he was not guilty of laches was proper. *Allen v. Barrett*, 213 Mass. 36, 99 N. E. 575 (1912).

Defendants obtained a permit to build on their premises on May 9, and the building was finished about the tenth or twelfth of June. On May 17, a petition was circulated to stop the work, which petition was denied, and on about May 20, one of the plaintiffs had a conversation with one of the defendants and objected to the building because, he claimed, it was in violation of restrictions imposed on the land. On May 27, and again on June 1, letters were written to defendants complaining of the building. On June 5 or 6 an interview was had by the plaintiffs' attorney with one of the defendants; on which occasion one of the defendants said she would let the plaintiffs know in a short time whether she would remove the building or not. She did not do so, and on June 14, a bill was filed in equity to enjoin the violation of the restrictions. It was held that there was nothing in these facts to show any unreasonable delay on the part of plaintiffs in bringing their bill, or anything showing either actual consent or passive acquiescence on their part. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936 (1901).

Where plaintiffs notified defendant's architect, in charge of the construction of defendant's building, as soon as the intended shape and location of the building were indicated, that he was violating the restrictions and that plaintiffs would use all the means in their power to resist it, and where the defendant admitted that something was said to him soon after the work was begun, about its being in violation of the restrictions, the plaintiffs were not estopped from enjoining the violation of the restrictions because the building was finished when the action was instituted. *Linzee v. Mixer*, 101 Mass. 512 (1869).

"We cannot lose sight of the fact," said the court, "that, in building as he did, Mixer (the defendant) was acting under a claim of right. He did not ask their (plaintiffs') consent, and does not appear to have troubled himself to inquire whether they assented or objected to his mode of proceeding. He undertook to carry out his own interpretation of his title deeds, and to reject and repel their interpretation. He saw fit deliberately to proceed and build upon the reserved land, and denies that his neighbors have any right to object or complain. It was no part of his right to compel them to resort to legal process to restrain his operations *in limine*. He is not in a position to say that he had any reason to suppose that they consented to his operations, or that he has been misled, or is taken by surprise, by finding that they deny his right to build as he has built."

The delay in bringing this action was partly due to the fact that when the foundation was laid the plaintiffs applied to the commissioners on public lands to enforce the condition of the Commonwealth's deed, and received a general assurance that they would be protected in their rights. However, nothing more came of the complaint. Relative to the delay, the Court said: "We think that under the circumstances their delay to file their bill in equity is sufficiently explained and accounted for, by the fact that they had applied to the commissioners for relief, and had a right to expect from them a decision upon the question submitted. It is true that 'it would be contrary to equity and good conscience to suffer a party to lie by, and see acts done, involving risks and expense, by others, and then permit him to enforce his rights, and thereby inflict loss and damage on parties acting in good faith.' It is quite enough that the circumstances show that there was no laches on the part of the plaintiffs."

Where the construction of a building by defendant in violation of a restriction was concealed from public view by a high board fence, which enclosed the premises along the sidewalk, and complainant filed his bill as soon as he discovered that the building was in violation of the restriction, it could not be contended that he was guilty of laches in failing to act

sooner. *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591 (1909).

A remonstrance against an unauthorized projection from the front wall of a building was made before the wall was erected. After its completion an action was brought to enforce the removal of the projection. Held, that the complainant was not guilty of laches. *Attorney General v. Algonquin Club*, 153 Mass. 447, 27 N. E. 2 (1891). "If the defendant, after deliberately proceeding in the face of the remonstrances, can yet be heard to urge that after all no order for their removal should be passed, it would gain something not much short of a right by stoutly asserting an invalid claim."

Plaintiff and defendants were owners of adjoining property separated by a private alley, which the parties had agreed to keep open for the admission of light and air, and for use of themselves and tenants. One of the defendants commenced the erection of a building on its property and erected a smoke stack in the alley which constituted a violation of the agreement relative to the alley. Plaintiff objected to the maintenance of the smoke stack as soon as it was erected, and complained to the secretary of one of the defendants, who was an attorney, and who informed him that, by virtue of a recent decision of the courts, defendants were entitled to so maintain such smoke stack. Plaintiff, however, was not entirely convinced, but was not aware of his legal right to enjoin the same until a long time thereafter, and he could not have determined the extent of the inconvenience until after the stack was completed. It was held that he was not barred by acquiescence from subsequently enjoining the maintenance of the stack. *St Louis Safe Deposit & Savings Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S. W. 474 (1903).

The owner of land subject to a restriction that no dwelling house should be erected thereon violated such restriction in the early summer of 1909, but the person for whose benefit such restriction was imposed did not know that any part of the building was used for dwelling purposes until October of the same year, which was long after the completion of the building. The latter then consulted an attorney, but no bill was filed to enjoin the violation until March, 1910. Held,

that complainant was not precluded by laches from obtaining relief. *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611 (1912). In this respect the court said: "In this class of cases in addition to whatever else may determine the court's acts, a very large, if not controlling, factor is the standing by with knowledge, or the ascription of knowledge, that the defendant is violating the covenant, and, after money had been expended by the defendant, then complaining that what he had done shall be undone."

Where complainant objected to the erection of a building by defendant as soon as its proposed location was brought to his attention, and delay in filing a bill for an injunction was caused by a neighborly agreement that work on the building should not be commenced until the controversy over the location was settled, complainant was not estopped from enforcing a restrictive covenant relative to such building by laches. *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982 (1912).

Where complainant notified the foreman of the work on a building, which it was claimed was being erected in violation of a restrictive covenant, that the erection of the building was in violation of a restriction imposed for his benefit, and after seeing that the work was being proceeded with filed a bill to enjoin the same as soon as possible, he was not guilty of laches. *Barton v. Slifer*, 72 N. J. Eq. 712, 66 Atl. 899 (1907).

Where complainant notified defendant as soon as it appeared that a building being erected by him would violate a restriction on the property, and defendant continued with the building and finished it after suit for an injunction was commenced, complainant was held to be entitled to a mandatory injunction. The completion of the building under these circumstances was at defendant's risk. *Morrow v. Haselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

The owner of land subject to certain building restrictions commenced the construction of a building which was in violation of such restrictions, and was notified by the owner of the dominant estate to discontinue such violation, which he accordingly did. Several months thereafter he resumed the construction of the building, and on the same day he commenced work he was again warned by the owner of the dom-

inant estate, but continued and rushed the work to completion within two days. Held, that he could not claim that the owner of the dominant estate was guilty of laches. *Hansel v. Downing*, 17 Pa. Super. Ct. 235 (1901).

Laches is not to be imputed to a party from the mere lapse of time alone; it is an implied waiver, arising from knowledge of existing conditions and an acquiescence in them. The question is one involving equitable principles and is determinable from the particular facts in each case. "Defendant now asserts," said the court, "that because he thus quickly succeeded in erecting his building in defiance of the prompt protest of the plaintiff, before the plaintiff had filed a bill to restrain him, the plaintiff must be held to have been guilty of laches and not entitled to equitable relief. The statement of such a contention is its own answer. In order to justify a holding that the plaintiff has lost, through laches, a right founded in express contract, it must appear that she has been guilty of some omission which would warrant the presumption that she had abandoned her claim and declined to assert her rights. It clearly appears from the defendant's answer that he had full knowledge of plaintiff's right and her intention to assert it; there was in their dealings nothing which had the appearance of acquiescence upon her part in the course upon which she had determined."

A deed provided that the premises conveyed should be used only as a blacksmith and wheelwright shop, and provided for a forfeiture of the estate upon violation of such restriction. It appeared from the evidence in an action brought to require specific performance of such provision that there were departures from the letter of the restriction in the use of the property, but it was not clear that all the violations came to the knowledge of the complainant. It appeared that at one time a portion of the building was used as a place to build a number of boats; but blacksmithing formed a considerable part of the process of boat building. A portion of the building was for a time used as a place of meeting for lodges after the regular meeting place had been destroyed by fire. A part of the building was used for a considerable time as a cobbler's shop; but it appeared that the repairing of shoes was carried

on in connection with harness making, one of the trades permitted by the restriction in the deed. Another portion of the building was used for making, repairing, and storing of sails; but the repairing of tackle was permitted by the deed. All these departures were violations of the letter of the restriction rather than its spirit. The complainant admitted that he went to the cobbler's shop to have harness repaired, but claims that he knew of no violation of the restriction until he learned of the acts of the respondent and her tenants, and that then, at once, he commenced this suit. Held, that complainant was not barred by laches from maintaining the suit. *Ball v. Milliken*, 31 R. I. 36, 76 Atl. 789 (1910).

§ 397. That complainant has violated the restriction he seeks to enforce.

It is well settled that one who violates a mutually restrictive covenant cannot complain to a court of equity of a similar violation by his neighbor. *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158 (1913); *Alvord v. Fletcher*, 28 N. Y. App. Div. 493, 51 N. Y. Supp. 117 (1898); *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048 (1909); *Clum v. Brewer*, 5 Fed. Cas. No. 2, 910 (1856); *Perkins v. Coddington*, 27 N. Y. Super. Ct. (4 Rob.) 647 (1865); *Schermerhorn v. Bedell*, 163 N. Y. App. Div. 445, 148 N. Y. Supp. 896 (1914).

A complainant cannot enjoin building operations on an adjoining lot as being in violation of a restriction when he has been guilty of similar operations on his own lot. *Hyman v. Tash*, ... N. J. Eq. ..., 71 Atl. 742 (1908).

The owner of a lot cannot enforce the observance of a restriction imposed upon a neighboring lot, although imposed for his benefit as one of a number of grantees, where he has been guilty of a similar violation of a like restriction imposed on his lot. *Schubert v. Eastman Realty Co.*, 25 Ohio Cir. Ct. Rep. 336, 15 O. C. D. 336 (1903). This is on the principle that he who would invoke the aid of a court of equity "must come with clean hands." *Compton Hill Imp. Co. v. Tower*, 158 Mo. 282, 59 S. W. 239 (1900).

If the case shows a wilful violation on the part of the claimant of the covenant which he seeks to enforce, he is pre-

cluded from relief under the familiar rule that, he who seeks equity must do equity; or in other words, must come with clean hands and be free from iniquity in respect of the same subject matter. This rule, however, is not applicable where, although complainant has not abided the covenant, he has not acted with a wilful purpose to disregard the rights of others. The doctrine of abandonment is less harsh than this rule, and may often defeat complainant's suit where the application of this rule would seem harsh and almost inequitable. *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668 (1907). Such a complainant is not in a position to justly complain, for he does not come into court with clean hands respecting the precise subject as to which he invokes relief, nor has he complied with the maxim that he who seeks equity must do equity. *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40 (1910).

In determining whether complainant is chargeable with such inequitable conduct as to disentitle him to enforce any rights whatever under a restrictive covenant, the whole situation and circumstances as to the nature, burden and object of the covenant, and the extent to which the violation by the complainant affects the covenant, must be considered as well as the circumstances of its violation. The denial of the remedy or relief depends upon the whole circumstances of the case, as affecting his own equitable status. *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982 (1912).

The violation to have the effect of precluding complainant's right to enforce observance of such restrictions must be such as to affect in a substantial manner the benefit to the other lots within the restrictive covenants.

Although the complainant has acted in good faith and unintentionally violated a restriction, he cannot enforce an adjoining owner to observe such restriction who has himself in good faith committed a similar violation. *Stollard v. Normile*, 181 Mass. 412, 63 N. E. 941 (1902).

The court will sometimes grant relief to a plaintiff who has not kept his part of the contract in question, but this is when the breach is of such a nature that it may be fully repaired, and one of the conditions precedent for obtaining the relief

may be full reparation. *Clum v. Brewer*, 5 Fed. Cas. No. 2, 910 (1856).

To allow a complainant who has violated a building restriction to maintain an action to enjoin a violation thereof by another property owner, would be to allow him to maintain inconsistent positions. In one case it appeared that in order to justify his own violation of the restriction, a complainant attempted to introduce evidence to show a custom of building bay windows in violation of building line restrictions, and at the same time to invoke the power of a court of equity to compel the defendant to conform to and observe a building line restriction. The court held that such evidence of a custom was incompetent, and that the complainant could not be permitted to show such a custom for that purpose. *Kneip v. Schroeder*, 166 Ill. App. 215 (1911).

In a bill for specific performance, the court will not inquire into breaches of other contracts between the same parties, even though they may be contained in the same instrument, provided they are only collaterally connected together. *Clum v. Brewer*, 5 Fed. Cas. No. 2, 910 (1856).

§ 398. Complainant guilty of only slight violations.

Although the complainant may have been guilty of some unsubstantial violation on his part of the covenant which he seeks to enforce, equity will prevent a substantial violation by the defendant. Thus, where complainant sought to enforce a restriction providing that dwellings erected on the premises in question should be set back twenty-five feet from the street line, the fact that the steps of his house projected about four feet into the restricted space on his own lot was not such a violation on his part as to preclude him from maintaining an action to enjoin the defendant from a substantial violation of the covenant. *Adams v. Howell*, 58 N. Y. Misc. 435, 108 N. Y. Supp. 945 (1907).

A defendant cannot successfully defend against the enforcement of a building restriction on the ground that complainant has been guilty of a violation of the same restriction, where the latter's violation is immaterial, and such as not to prevent

the restriction on property on the street in question from being carried out. *Hyman v. Trash*, ... N. J. Eq. ..., 71 Atl. 742 (1908).

Although the complainant has acquiesced in breaches of the covenant which he seeks to enforce observance of, he is not debarred of his remedy in equity, provided the breaches in which he has acquiesced have not caused substantial injury. *Western v. Macdermot*, L. R. 1 Eq. 499 (1866), affirmed in L. R. 2 Ch. 72, 15 L. T. Rep. 641, 36 L. J. Ch. 76, 12 Jur. (N. S.) 366, 15 Wkly. Rep. 265 (1867).

Whether a court of equity will or will not aid the plaintiff in such a case depends largely upon the question whether there has been such a material and substantial breach as will enable the court to say that it ought not to interfere. *Bacon v. Sanberg*, 179 Mass. 396, 60 N. E. 936 (1901).

Where the object of a restrictive covenant prohibiting the erection of buildings on lots within a certain distance of the street, is to secure and preserve the desirability of the street for private residence, complainant will not be denied relief against one who is substantially violating such restriction because he has erected a porch in front of his residence within the restricted area of his lot, where the porch does not substantially interfere with the easement of neighboring proprietors for light, air and view. *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53 (1900).

In this respect it was said by the court: "It is not shown by any evidence, nor can it be inferred from anything which appears in the case, that the porch is to any extent whatever subversive of that purpose. As Caskey had not in any substantial way violated the covenant by which both of the parties were affected, he was entitled to the aid of equity to prevent its substantial violation by the plaintiff in error."

It has been held that the complainant in a case would not be denied equitable relief in the enforcement of the observance of a building line merely because she erected a porch and steps in front of her residence within the restricted portion of her lot, the main body of her residence being twenty-eight feet from the street, and the building line being only twenty-

five feet distant therefrom, where the purpose of the restriction was to secure the right of view for private residents, and where it was not shown that the porch and steps substantially interfered with the enjoyment of such right of view. *Seawright v. Blount*, 139 Ga. 323, 77 S. E. 152 (1912).

The fact that complainant violated a restrictive covenant by the construction of an open piazza which extended into the restricted portion of his lot, but did not obstruct the view from adjacent property, will not bar him of a right to enforce observance of such restriction against an adjacent owner as his violation is immaterial. *Newbery v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752 (1909).

Complainant was the owner of one of the lots in a tract of land on which a building line was established by restrictive covenant. The front foundation wall of his house was back of the line, and an open piazza supported and enclosed by a solid wall three or four feet high extending about one-half the width of the house projected into the restricted portion of the lot, and the second story of the house projected over the piazza and extended over the building line a distance of about four feet. Held, that complainant's violation of the restriction was not such as to preclude him from enforcing observance of the restriction by the owner of an adjoining lot. *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982 (1912).

In this respect the court said: "As to this the real question is, whether this violation of the covenant by complainant is such as to disentitle him to any enforcement of the covenant whatever. The equitable rule applicable to the solution of the question is the general fundamental rule or maxim, that the complainant must come into court with clean hands, or, as it is sometimes expressed, 'He that hath committed inequity shall not have equity.' . . . The violation to have this effect must, I think, be such as to affect in a substantial manner the benefit to the adjoining lots, of the covenant imposed on the complainant as part of the consideration of the grantor's deed to complainant. Considering the manifest general object of the covenant and the effect of this structure, this projection of the second story a few feet beyond the sixty

foot line does not, in my judgment, so substantially affect the beneficial effect and operation of the complainant's own covenant as to disentitle complainant to its enforcement against purchasers of the adjoining lots with notice of the location before their purchase."

Complainant and other property owners abutting on a city street entered into a covenant whereby they added a strip of ground in front of their lots to the sidewalk and agreed that no building should be erected thereon. Complainant maintained certain show cases, eighteen by twenty-two inches square and four feet high, which were attached to the wall of his building by brackets so as to be easily removed, and they were maintained with the understanding that they were to be removed at any time in case of protest. Held, that these facts did not estop complainant from enforcing the covenant against defendant's erection of a display store window, covering almost the entire restricted space. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

In a suit in Massachusetts seeking a mandatory injunction to compel the removal of a part of defendant's house which it was claimed was erected in violation of certain restrictions, the defendant contended that the plaintiffs could not prevail because they themselves were violating the same restriction which they sought to enforce against the defendant. It appeared that the original deed from the city of Boston, through which the defendant gained title, contained the clause that "A dwelling house has been erected and completed on said lot in conformity with the conditions and restrictions." It was found that the constructions were those originally placed there, and that they were substantially the same on the two lots. They were regarded on all sides for more than fifty years as in essential compliance with the restrictions. It was further found that the minor respect in which it was claimed the plaintiffs had violated the restrictions were of a character wholly different from the infractions committed by the defendant. It was held that the plaintiffs were not estopped on this account from maintaining the action. *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37 (1910).

§ 399. As dependent upon the comparative extent of complainant's violation.

In an action to enforce the observance of a restriction to the effect that no building or structure should be placed within thirteen feet of a certain street on the land in question, it was shown that the defendant had violated the restriction by the erection of a one-story building the whole of which was within the prohibited thirteen feet. It also appeared that the plaintiffs had violated the same restriction contained in their own deeds by projecting from their respective houses bay windows, piazzas and steps into the restricted space. It was held that the plaintiffs could not have enjoined the defendant from erecting a piazza, bay window or steps extending into the restricted space, but that as the building of a separate house in the space was something which they had not done, they were entitled to a decree ordering the defendant to remove the structure thus erected by him. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936 (1901).

Where a grantor covenanted not to build on a certain portion of his remaining lands on the easterly side of a certain avenue, the object being to secure for the grantee's premises an unobstructed view of the ocean, the fact that the grantee added a portico to his buildings which extended onto the restricted land, did not justify the grantor in constructing a pavilion on the land so restricted. *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961 (1889).

On the other hand it has been held that where a number of lot owners in a block have violated a building line restriction to suit their own desires and convenience, they cannot enjoin a violation of a restriction by another merely because his violation is to a greater extent than theirs. *Curtis v. Rubin*, 244 Ill. 88, 91 N. E. 84 (1910). And again, that where complainants have erected buildings with walls, bay windows and swell fronts extending beyond the established building line, they have no standing in equity to enjoin another property owner from erecting his building in greater disregard of the restricted line. *Kneip v. Schroeder*, 255 Ill. 621, 99 N. E. 617 (1912).

§ 400. Complainant's violation.—Attempt to alter restriction.—Defendant not bound.

All of the lots in a tract of land, with the exception of a corner lot, were deeded subject to a restrictive covenant that no building should be erected within twenty feet of the street line, but in regard to the corner lot it was provided that no building should be erected within ten feet of the street line. The lots were conveyed under a general plan of improvement and there was mutuality of covenant and consideration in their conveyance to the several grantees. The grantees owning the lots subject to the twenty-foot building line entered into an agreement modifying the covenant so as to limit the restriction to ten feet, but the owner of the corner lot in question was not a party to such agreement, and was in no way bound thereby. In an action brought by a complainant, owner of one of the lots which was subject to the twenty-foot building restriction, to enjoin the owner of the corner lot from erecting a building nearer to the street than ten feet, it appeared that such complainant had erected a building on her land at a distance of only ten feet from the street line. It was held, therefore, that she was not entitled to prohibit the defendant from erecting a building on his lot in violation of the restriction, because the defendant was in no way bound by the agreement modifying the restriction imposing the twenty-foot building line. *Coates v. Cullingford*, 147 N. Y. App. Div. 39, 131 N. Y. Supp. 700 (1911).

§ 401. Where complainant's violation was assented to by only other party in interest.

It has been held that where, before erecting his house on restricted property, complainant secured the approval of his grantor, who at that time owned the adjoining lots, and erected his house accordingly, although it violated the restrictions, he was not thereby precluded from enforcing the observance of such restrictions by the purchasers of the adjoining lots, although they knew nothing of the agreement. *Howland v. Andrus*, 80 N. J. Eq. 276, 83 Atl. 982 (1912).

In the case cited it was said by the court: "There is a further reason why the complainant's construction of his

dwelling on these lines cannot be considered as an inequity which deprives him of any relief on his grantor's covenants. It is proved that before locating and building his dwelling, he submitted the plans to his grantor, Mr. Bardsley, then still the owner of the adjoining lots on both sides, and that Mr. Bardsley approved and consented to them as complying with the restrictions, and the dwelling was erected after such approval. This approval was proved, it is true, by parol evidence *dehors* the deed, and no evidence of defendant's knowledge of it has been shown. But while this fact would be important as a defense if the application were now to enforce against defendant a parol variation of the covenant in the deed of which the defendant has constructive notice, it is not entitled to any decisive consideration upon the precise question now to be solved, viz., whether the complainant's location of the upper story of his dwelling a few feet within the restricted lines is, on the whole circumstances of the case, such an inequity that he should be deprived of any equitable relief upon the covenants as to the adjoining lots. And in solving that question of complainant's status, the conduct of the grantor, who then owned these adjoining lots, in approving the construction as a proper location of the line under the covenant, is vital and decisive. Defendant's contention is that this location, even if consented to by the grantor, had the effect *ipso facto* of relieving the adjoining lots from any burden of the covenants as to the restricted line, so far as they were imposed by the deed itself, and that any subsequent grantee without notice of the location by consent and with notice only of the restrictions in the deed, holds the adjoining lots free from any restriction as to the distance of the dwelling from Wildwood avenue merely because a portion of the dwelling is within the line. In my judgment, the matter of the location of the dwelling on the line in this case was somewhat analogous to the location of a boundary, locations of dwellings not being such as apparently and substantially affect the beneficial operation of the covenants, should not, as between subsequent purchasers claiming under the parties agreeing on the location, be treated as if made without agreement and under the assertion of independent adverse rights

under the covenant, or in violation of it. Defendant's claims that this location was a violation of the covenant, putting complainant in such an inequitable position as to disentitle him to enforce the covenant in equity, is therefore fairly met, I think, on the proofs with the answer that the location was agreed on by the parties then interested, as a substantial compliance with the restriction, and with the object of substantially complying with it and securing its benefits of the adjoining lots."

§ 402. Where only some of a number of complainants have violated restriction.

Where several complainants join in the same suit to enjoin the violation of a restrictive covenant, the fact that one of them has been guilty of a violation of the same covenant which they seek to enforce observance of, would not prevent the granting of injunctive relief in the action. *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911).

If the complainant who was guilty of a breach of the covenant was the only complainant in the case the general rule would apply, of course, but where there are several other complainants against whom the defense is not operative, their rights cannot be affected by such conduct of such other complainant.

§ 403. Change in the character of the restricted territory.

Courts of equity have uniformly refused to interfere for the purpose of enforcing restrictive covenants in cases where the evidence shows that a state of things has arisen in the march of events which the parties to the agreement did not contemplate when it was made, and which would render its enforcement inequitable and unjust, resulting in injury to the defendant without any permanent benefit to the complainant.

Where the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and owing to the general growth of the city, and the present use of the whole neighborhood for business, the purpose can no longer be accomplished even if all the restrictions should be rigidly

enforced, it would be oppressive and inequitable to give effect to the restrictions, and to enforce them would only harass and injure the defendant, and equity will not enjoin their violation. *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476 (1892).

"It is not for the interest of the community, nor is it the policy of the Commonwealth, that, as conditions greatly change in our large cities, restrictions put upon land in reference to the quiet residential streets should continue, when the neighborhood is entirely given up to business, unless they are so expressed as plainly to be binding." *Boston Baptist Social Union v. Boston University*, 183 Mass. 202, 66 N. E. 714 (1903).

Equitable jurisdiction to enforce restrictive covenants is not absolute, but is governed by the same general rules which control the equitable relief of specific performance of contracts. If, therefore, the restrictive covenants in deeds to lots were made in evident reference to the continuance of the existing condition of the property and surroundings, but in the lapse of time there has been a complete change in the character of the neighborhood, equitable relief will not be granted, and the plaintiff will be left to his remedy at law. For example, if the covenants restricted the grantees of lots to use for purposes of residence and since their execution the whole neighborhood had ceased to be used for such purposes and had been wholly given up to business, manufacturing, and the like, equity might, on that account, refuse to enforce observance thereof. *Moore v. Curry*, 176 Mich. 456, 142 N. W. 839 (1913).

The fact that since the imposition of a restriction on property the character of the neighborhood has changed, is a consideration which affects the discretion of a court of equity in enforcing a restrictive clause. *Leonard v. Hotel Majestic Co.*, 17 N. Y. Misc. 229, 40 N. Y. Supp. 1044 (1896).

Where the value of building lots has been virtually destroyed for residence purposes by the construction of an elevated railroad through the block, equity will not enforce the observance of a building line restriction, which, when imposed, had in view the use of the property for dwelling pur-

poses, but will leave the parties to their action at law. *Kneip v. Schroeder*, 255 Ill. 621, 99 N. E. 617 (1912).

This principle, however, has never been applied where by a conveyance or indenture a certain part of the property has been devoted to a use which can be shared by adjoining property which belonged to the same owner and which had been for many years improved and occupied in accordance with the mutual covenants to which all the adjoining property was subject. Under such a reservation or covenant there has been acquired a property right which is appurtenant to the dominant owner's property and to which the servient owner's property is subject, and which cannot be destroyed without compensation. *Batchelor v. Hinkle*, 132 N. Y. App. Div. 620, 117 N. Y. Supp. 542 (1909).

Where the change in the neighborhood does not tend to defeat the essential purpose of the restrictions, the benefit therefrom is considered to remain unimpaired, and a violation will be enjoined. *Sanford v. Keer* ... N. J. Eq. ..., 83 Atl. 225 (1912).

When restrictive covenants are applicable to the neighborhood only as a residential one, and relate to the protection of the dwelling house occupied by the grantor in the deed, they will not be enforced when the entire property in the neighborhood changes from a residential one to one used exclusively for business purposes. *Deeves v. Constable*, 87 N. Y. App. Div. 352, 84 N. Y. Supp. 592 (1903).

In construing covenants of this character, which were attempted to be enforced under such circumstances, the court said: "Each and every of these covenants has relation to the protection of the dwelling house occupied by the grantor in the deed. The language used is not apt for any other purpose; for that purpose the words of the covenant are precise and appropriate, so that taking into consideration the fact that this was a residential neighborhood, that the grantor had erected a dwelling house upon the premises, and that he desired to protect the use thereof from all obnoxious surroundings, and made precise stipulations to that end in the covenant itself, it follows as an irresistible conclusion that the purpose and object which the grantor had in mind was to

protect himself in the enjoyment of his property for purposes of a residence free of any disagreeable environment. It is evident, therefore, that when the conditions were radically and entirely changed, and the property ceased to be used for residential purposes and the whole street was devoted exclusively to business use, the reason for the existence of the covenant failed, as no residence remained to be protected, and to continue to restrict the use of the land confers no benefit upon the grantor or his successors in the covenant. As no benefit is to be derived to the dwelling house to which the covenants apply, equity forbids that the restrictions shall still be enforced when its only effect is to operate disadvantageously to the present owners of the land, to whom the covenants apply."

Where a restrictive agreement was entered into between a number of owners of property on the same street, with reference to it as a residential neighborhood, such restrictions will not be enforced a number of years thereafter when the neighborhood has changed from a residential to a business one, and to enforce the restrictions would be to impose a hardship on the defendant without benefiting the complainant. *Schefer v. Ball*, 53 N. Y. Misc. 448, 104 N. Y. Supp. 1028 (1907).

In this case the court said: "It would appear that for the the last sixty years this part of Thirty-Seventh street, with few exceptions, has been used exclusively for residential purposes, the houses having a set-back of seven feet. Within recent years this locality has materially changed in character. It is fast becoming a business center, with business buildings of enormous value. The avenues and streets immediately bounding Thirty-Seventh street have entirely lost their residential character, and have become business streets. The most valuable use to which property can be put in that neighborhood and in Thirty-Seventh street itself is a business use with large business buildings. To enforce this covenant so long after its usefulness has disappeared, and to forbid the defendant to make this most valuable use of his property, would be injuring the defendant without conferring any benefit upon the plaintiff."

It has been held that a restrictive covenant providing that

any house or erection that shall be placed upon the premises in question shall be set or placed back at least twenty feet from the line of the street on which the same shall be placed, which restriction was imposed in pursuance of a general plan of improvement, may be enjoined if a departure therefrom would result in the erection of houses on lines out of harmony with the general character of the neighborhood; but if, on the other hand, an enforcement of the covenant would involve a departure, with reference to the building lines, from the general locations of the surrounding buildings erected since the covenant was executed and would deprive the owner of an opportunity to improve his land as the adjacent lands had been improved, equity would not grant injunctive relief. *Roth v. Jung*, 79 N. Y. App. Div. 1, 79 N. Y. Supp. 823 (1903).

Where the defendant in an action to enforce observance of a restrictive covenant sets up as a defense the fact that there has been such a change in the character of the restricted neighborhood that it would be inequitable to enforce observance of the covenant in the particular instance, the burden of proving such a change is upon him. *Roth v. Jung*, 79 N. Y. App. Div. 1, 79 N. Y. Supp. 823 (1903).

§ 404. — illustrative cases.

A sub-division was intended to be restricted to first class residences, and lots were sold therein with the understanding that the sub-division would be entirely free from business houses, saloons, double houses, flats, public places, and anything which would be detrimental to home surroundings. The complainants purchased lots in the sub-division relying on such inducements and promises that all of the lots would be so restricted and kept under such restrictions, and in reliance thereon built homes on their lots, ornamenting and beautifying their grounds, and established their residences there at great expense. They were induced to make such investments by reason of the environments and representations so made that it would be a restricted, quiet, suburban district, free from factories, saloons, and other things detrimental to home making. Complainants filed a bill in equity

to restrain defendant from erecting a general store building, and it appeared that to accommodate a rapidly increasing population of that territory, certain kinds of business followed, and buildings to accommodate such business were erected in that locality. The most desirable site for business commanded a better price for such purposes than for residences, and unrestricted lots sold for a higher price than restricted lots, but the district had remained distinctively a suburban residential district. It also appeared that there were other unrestricted lots convenient if more business places were needed. It was held that no such change had been shown in the character of the neighborhood as would justify the court in refusing the relief sought, and decree was entered so as to give the parties the right to bring to the attention of the court any marked change in the future condition of the property. *Moore v. Curry*, 176 Mich. 456, 142 N. W. 839 (1913).

In this case the court said: "The most desirable site for business will command a better price for such purposes than for residences. This is true of every restricted district which has developed to a point where the population and environments make a local demand for business. Since the construction of a belt line railroad around the city of Detroit, a few large factories, including the Ford automobile works, have been erected in the village on or near such belt line. This has increased the importance and population of said village, but its original distinctive characteristic as a village of suburban homes yet remains. To accommodate the inhabitants of the village as the population increased, the number of business places along Woodward avenue has increased; but it is shown there are sufficient to supply the needs of the community now and unrestricted vacant lots convenient for more when needed, but it is by no means shown that the whole neighborhood has ceased to be adapted to and used for residences and been given over to business. It is shown that it would be an injury to the residents on this sub-division for stores to be erected on the front along Woodward avenue with their rears towards the homes upon the sub-division and cutting off a view of the avenue. By their contracts the purchasers of lots in the sub-

division back of Woodward avenue are entitled to have either a view in that direction or a line of appropriate residences fronting upon it. The only equitable consideration for refusing this relief, under present conditions, is that the lots on Woodward avenue would sell for more with the restrictions removed. This is not sufficient."

Property in a high class residence neighborhood was restricted to residences intended for the use of one family, and many such buildings had been erected therein, some costing as much as twenty thousand dollars each. The restriction had been violated in one instance by the erection of a double house on one of the lots. In an action to enjoin the erection of a four-family flat in violation of the restriction it was contended that there had been such a change in the character of the neighborhood as to justify such violation. Held, that the single breach of the restrictive covenant by the erection of the double house, which was not a flagrant breach, did not justify such contention. *Misch v. Lehman*, ... Mich. ..., 144 N. W. 556 (1913).

In this respect the court said: "Defendants urge that there is such a change in the character of the neighborhood as to make it inequitable to enforce the restriction. Here is a large sub-division upon which there have been erected many beautiful homes, costing up to \$20,000 each. The development of that part of the plat fronting upon the boulevard is shown by the record to have been of a particularly high class, with the single exception of the house upon lot 29. There can be no doubt that the erection of the contemplated structure upon the corner of Mack avenue and the boulevard would very seriously affect the values of the complainants' property, and would thus destroy the negative easement, which complainants, by virtue of the restrictive clause, have acquired in defendants' lot."

In 1849 the owners of land lying in two blocks in New York city wishing to make it "a desirable location for residences and buildings of the first class," entered into an agreement respecting the same, and among other things, provided that the buildings to be erected on the land should "be set back uniformly on a line five feet from the sides of said street

respectively, so as to form court yards of five feet wide on each side of the said two blocks upon the said street." The land was improved in accordance with such restrictive agreement, but thereafter the neighborhood was changed by business encroaching upon it, and it was no longer a desirable location for residences. Defendants commenced the erection of a twelve story building on their lot, built out flush with the street line, and plaintiff, owner of a building about one hundred and fifteen feet distant therefrom, brought this suit to enjoin its maintenance in such location. It was shown that the object of the parties to the agreement had practically been defeated in the lapse of time; that the plaintiff would suffer no substantial damage from the building, but on the contrary both the market and rental value of her property, and all the property in the block would be increased thereby, and that the use of defendant's building would not interfere materially with the actual use of plaintiff's property. It was further shown that the defendants acted in good faith in erecting their building on the street line, believing that they had a right to do so, and that it would cost \$66,000 to remove that part of the structure which stood on the five foot space. It was held that a court of equity would not enforce such agreement, and that the plaintiff must be remitted to an action at law for damages. *Batchelor v. Hinkle*, 210 N. Y. 243, 104 N. E. 629 (1914), reversing 149 N. Y. App. Div. 910.

Plaintiff and defendant were the owners respectively of premises numbers 74 and 76 Horatio street in the city of New York. Many years before the locality was a residential one and both parcels were owned by one Cutting who conveyed each subject to a covenant that "no buildings other than dwelling houses or stores of brick, stone or marble of at least two stories in height covering the whole front of each of the lots" should be erected thereon, as well as a further covenant against nuisances, embracing slaughter houses, furnaces, various manufactories, tanneries, "or any other manufactory, trade, business or calling whatsoever which may be in any wise dangerous or noxious or offensive to the neighboring inhabitants." Since the covenant was entered into the character of Horatio and surrounding streets entirely

changed. At the time of the suit plaintiff lived in his house, which was an old three story, one family dwelling. The defendant's house was of the same character, but he used the first floor for a wholesale oyster market and lived on the upper floors. Number 68 Horatio street, located two doors from plaintiff's premises, was occupied as a Chinese laundry, with a stable in the rear and sawdust factory in the upper part. Near by four houses had been converted into a double tenement house, with four families on a floor, and other double tenements so occupied were in the immediately vicinity. The surrounding streets were filled with tenement houses of poor character, stables, spaghetti factories and various industries incompatible with an ordinary residential district. The defendant purposed to remodel his house and convert it into a stable and carriage house, and the plaintiff sought to enjoin him from so doing in view of the covenant in question.

In denying an injunction in this case, the court said: "We think the stipulated facts show that there has been such a change in the character of the neighborhood as to defeat the object and purpose of the covenant and to render it inequitable to deprive the defendant of the privilege of conforming his property to the uses to which the surrounding property is put. Where such a situation exists a court of equity will not enforce the observance of the covenants at the instance of an owner who otherwise would be entitled to the benefits of the restriction. The plaintiff should not, therefore, have the injunction which he asks." *Schwarz v. Duhne*, 118 N. Y. App. Div. 105, 103 N. Y. Supp. 14 (1907).

Even if it be admitted that the erection of a six story apartment house, costing seventy-five thousand dollars, and containing all modern improvements, is in violation of a restriction limiting the buildings to be placed on the land in question to first class dwelling houses, equity will not enjoin the erection of such a building where, since such restriction was imposed on the land, the character of the neighborhood has changed so that the surroundings are made up of common tenement houses, a hospital, cafe, boarding houses, sanitarium and buildings used for business purposes. *Bates v. Logeling*, 137 N. Y. App. Div. 578, 122 N. Y. Supp. 251 (1910).

Plaintiff and the defendant railroad company derived title to their respective lands from a common source. Defendant operated an elevated railroad on its land, and plaintiff's land was covered with a building, the first floor of which was used for business and the upper floors were let for residence purposes. There had been a restriction against offensive establishments imposed on the use of the land of both plaintiff and defendant. However, in a number of deeds prior to and since the construction of the railroad no reference was made to such covenant, but it appeared in the deed to the plaintiff, which was executed in 1905. At that time the road had been in operation about eighteen years, and the property in the immediate neighborhood had changed to a factory section and ceased to be used for residential purposes. It was held that the enforcement of the covenant under the circumstances would be inequitable. *Antes v. Manhattan R. Co.*, 116 N. Y. Supp. 697 (1909).

§ 405. — where restriction is still of value to dominant estate.

If a restriction is still of substantial value to a dominant estate, notwithstanding the changed use of the land and buildings in the vicinity, equity will restrain its violation if relief is promptly sought. *Landell v. Hamilton*, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227 (1896).

In this respect the court said: "As long as such restrictions are not unlawful, it is to no purpose to argue, that they seriously retard the improvement of the city. We can no more strike down by decree a lawful restriction creating an easement, than we can compel the lot owner to erect buildings in accord with the best style of architecture. Contracts such as this whether construed as covenants or conditions, have been enforced, both at law and in equity between the immediately parties to them and their grantees, near and remote."

Where the restrictive covenant is still of value to the dominant estate, it will be enforced in equity, notwithstanding a changed condition of the neighborhood in which the property is situated. *Brown v. Huber*, 80 Ohio St. 183, 88 N. E. 322 (1909).

A partition deed contained a covenant that no building should be erected on any of the lots between a line fixed as a building line and the street. Subsequently the character of the neighborhood changed from residence to that of business, but the restriction was as valuable for business as for residence purposes. Held, that the erection of a building on the restricted strip would be enjoined. *Zipp v. Barker*, 40 N. Y. App. Div. 1, 57 N. Y. Supp. 569 (1899), affirmed in 166 N. Y. 621, 59 N. E. 1133 (1901).

Referring to the covenant in question the court said: "It is not a covenant against a particular class of buildings suitable to a neighborhood, but a covenant that a condition should be maintained which is just as valuable for a business as for a residential neighborhood. Indeed, we are of the opinion that the value of the easement in the courtyard strip, under the particular facts of this case, is greater for business than for residential purposes. We might assume that originally the covenant had relation to the condition of the property at that time, and that the co-parceners had no thought of its coming change; but it is difficult to see why the maintenance of the easement is not more essential to the value of the plaintiff's property as business premises than it would be if it were used as a residence. Elm place is a short street terminating at Livingston street. Most of it is already devoted to business. The plaintiff's store adjoins the lot at the corner of Fulton street, and is distant only one hundred sixteen feet therefrom. There is a wide sidewalk extending from the corner to the plaintiff's premises. There is also an elevated railroad station, which brings many people to the vicinity, and at the same time somewhat impedes the view to be had of the plaintiff's premises. It is of great importance to the complete use of her premises that the front should be visible from Fulton street. A full opportunity to read signs lawfully exposed on the front of the buildings is of value to the plaintiff. The defendant's erection interferes with such view; and we are not prepared to say that it was not in the minds of the parties to the partition deed that the growth and extension of business might change the character of the neighborhood. At all events, the plaintiff obtained an ease-

ment to light and air and unobstructed view, and with this easement a court of equity will not interfere or permit interference by others who are privies to the covenant."

But where the character of a neighborhood has so changed that restrictions imposed upon the property have become, to a great extent, valueless to the owners, they may not, in the exercise of the discretion of the court, be enforced in equity. *Russell v. Harpel*, 20 Ohio Cir. Ct. Rep. 127, 10 O. C. D. 732 (1900).

§ 406. — where the restriction renders servient estate of little or no value.

Where the change in the condition in the surrounding property is such that a performance of the covenant in the deed would injure the grantee's property, or make it yield less profit, or make it incapable of yielding any profit, the covenant will not be enforced as being unreasonable and oppressive. Where, for instance, the covenant required that only dwelling houses, or dwelling houses of a certain price, should be erected, and that the premises should not be used for trade or business, and the neighborhood had so changed that only dwelling houses of a cheaper kind, or houses for trade or business, would be profitable, the court refused to enforce by injunction a performance of the covenant. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 144 (1896), affirming 59 Ill. App. 581 (1895).

§ 407. — as dependent upon conduct of complainant.

The rule has been laid down in an English case that, to dis-entitle an owner to enforce a restrictive covenant it is not sufficient to establish a change in the character in the neighborhood without positive evidence of personal acquiescence on the part of the person seeking to enforce the covenant. *Pulleyne v. France*, 57 Sol. Jo. 173 (1913).

In the case of *Osborne v. Bradley* (1903) 2 Ch. 446, 89 L. T. Rep. 11, it was declared that the right of a person to enforce a restrictive covenant by injunction could not be defeated by mere change in the character in the neighborhood unless there was an equity against him arising from his acts or conduct in

sanctioning or knowingly permitting such change as to render it unjust for him to seek relief by injunction.

Where the owner of a residence in a restricted neighborhood still resides there, and has done nothing to defeat her right, the fact that the character of the locality is changing and the premises are no longer kept for residence purposes, will not deprive her of her right to enforce a restriction against a business "injurious or offensive to the neighboring inhabitants." *Rowland v. Miller*, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182 (1893).

"Here," said the court, "the plaintiff has the right to occupy her house as a residence, and in such occupation to have the protection of the restriction agreement. She has never violated the agreement herself, or consented to, or authorized or encouraged, its violation by others. In order to have the benefit of the agreement, she is not obliged to sue all its violators at once. She may proceed against them seriatim, or she may take no notice of the violations of the agreement by business carried on remotely from her residence, and enforce it against a business specially offensive to her by its proximity. This is not a case where the defendants can ask for immunity in an equitable forum because others are, in a greater or less degree, also violators of the agreement. The plaintiff has done nothing and omitted nothing which should authorize the occupant of an adjoining lot, in violation of the agreement, to make her residence uncomfortable and undesirable. Generally, whether an equity court will refuse to restrain the violation of such an agreement, and leave the parties to their legal remedies, on account of the changed condition affecting the premises to which the agreement relates, rests in the discretion of that court, and such discretion will not be reviewed upon appeal here. The question to be determined in the exercise of such discretion depends largely upon the fact, and mainly whether the enforcement of the agreement would greatly harm the defendant without any substantial benefit to the plaintiff, so as to make the enforcement inequitable."

The grantee of property conveyed by a deed containing a covenant that the improvement of the adjoining property

which remained in the grantor should be by dwelling houses erected on the building line, may enforce such restriction while he occupies his property as a dwelling, although the character of the street has changed to that of business. *Holt v. Fleischman*, 75 N. Y. App. Div. 593, 78 N. Y. Supp. 647 (1902), reversing 37 N. Y. Misc. 172, 74 N. Y. Supp. 894.

It was held in this case that, although most of the lots in the block which the property in question was located were no longer used for residences, that furnished no reason why the plaintiff should be deprived of his right still to occupy his lot as a residence, and in such occupation to have the protection of the covenant.

An estate was subdivided into lots, which were sold to different purchasers, each of whom covenanted with the vendors and with the purchasers of other lots not to build a shop on his land, or to use his house as a shop or to carry on any trade therein. One of the purchasers brought suit to restrain another purchaser from using his house as a beer shop, which he claimed to be in violation of such covenant. The plaintiff had known for three years prior to the commencement of the action that the defendant was using his house as a beer shop and had himself bought beer at the shop. There was evidence to the effect that some of the houses built on other lots had been used for some time as shops. It was held that the change in the character in the neighborhood was not in itself sufficient for refusing relief to the plaintiff, as the change was not caused by his conduct. *Sayers v. Collyer*, L. R. 28 Ch. Div. 103, 13 Eng. Rul. Cas. 101 (1884).

On the other hand when a change in conditions rendering the enforcement of restrictive covenants inequitable, is due to the act of the grantor or is assented to by him, equity will not interfere at his instance. *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027 (1905).

Where land is conveyed in fee subject to a covenant on the part of the grantee, for himself, his heirs and assigns, with the grantor, the owner of the adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment of the land by the grantor of such adjoining lands, and

the subsequent acts of the grantor, or of those claiming under him, have so altered the character and condition of the adjoining lands, that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant, but will leave the parties to their remedies at law. *Duke of Bedford v. Trustees of British Museum*, 2 Myl. & K. 552, 6 Eng. Rul. Cas. 702 (1822).

§ 408. — steam and street railroads in street.

Lots abutting on a street which was occupied by railroad tracks were conveyed subject to restrictions. It was held that an increase in the number of trains passing through the street, and the switching of them near the lots, did not constitute such a change in the use of the street as would prevent equity from enforcing the restrictions, but that it was a mere aggravation in the use contemplated by the parties. *Equitable Life Assurance Society v. Brennan*, 24 N. Y. Supp. 784, 30 Abb. N. C. 260 (1893).

The mere presence of street railway tracks in a street will not turn it from a residence into a business thoroughfare. *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911); *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 379 (1909).

§ 409. — covenant against the sale of intoxicating liquor.

To defeat the enforcement of a restriction against the sale of intoxicating liquor on premises, on the ground of a change in the character of the neighborhood, there must be such a change caused by the grantor or those claiming under him, as to defeat the purpose of the restriction or to seriously injure the property rights of the grantee if enforced.

Where it did not appear that the establishment of new saloons would make the performance of a covenant prohibiting the use of premises for the sale of intoxicating liquor any more injurious to the owner's interests than was the case before the new saloons were established, such restriction will be enforced. *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 144 (1896), affirming 59 Ill. App. 581 (1895).

§ 410. — as a defense to action for damages.

Although the change in the character of the property in question and that in its vicinity on which restrictions are imposed may induce a court of equity to refuse to specifically enforce the observance of a restrictive covenant, such change does not present an answer to an action at law, which may be brought by one interested in the covenant, for damages sustained by reason of its violation. *Kountze v. Helmuth*, 67 Hun 343, 22 N. Y. Supp. 204 (1893).

§ 411. Change in character of territory surrounding restricted district.

The fact that the character of the territory surrounding a restricted district has changed does not affect the question of the enforcement of the restrictions within such district. *Thompson v. Langan*, 172 Mo. App. 64, 154 S. W. 808 (1913).

In an action to enforce the observance of a restrictive covenant, evidence of the class of property outside the restricted district is immaterial. *Bolin v. Tyrol Investment Co.*, ... Mo. App. ..., 160 S. W. 588 (1913).

In this case the court said: "The other points, as to the change of the character of the neighborhood, the fact that the restrictions were to expire in December, 1920, and that the adjoining property and the property on the opposite side of one of the streets running along the sub-division were free from restrictions and occupied not only by a cheap class of houses but by business and even manufacturing establishments, and that there was a street car running along one of the streets adjoining the sub-division, were disregarded by the learned trial judge, who ruled that testimony of that character, not relating to the sub-division itself, was immaterial. This ruling was entirely correct."

Where land was sold on partition subject to restrictions imposed for the benefit of the purchasers at the sale, and prohibiting any building other than dwelling houses from being erected thereon, a purchaser who had erected a dwelling on his land could maintain a suit to enjoin another purchaser from changing the building on his property to be used for business purposes, although the current of business in the

city had reached the restricted territory. *Pagenstecher v. Carlson*, 146 N. Y. App. Div. 738, 131 N. Y. Supp. 413 (1911).

In this respect the court said: "While it is quite true that the current of business has reached the restricted territory, that of itself does not afford ground for denying equitable relief, for it is apparent that such encroachment was anticipated. It cannot be said that the encroachments of business have made the property undesirable for private residences. A fine public building and a park occupy the block on the north side of Fortieth street. The plaintiff says that she wishes to enjoy her property as a private residence. When she purchased it she had a right to rely upon the assumption that the encroachment of business would be stopped at the line of the restricted territory, and, in our judgment, it is no answer to her claim for equitable relief that the property may be worth more for business purposes. The defendant bought knowing, or chargeable with knowledge, of the restrictive covenant. It was expressly provided in the referee's deeds that the covenant of the second party shall attach to and run with the land, and that it might be proceeded on for an injunction and for specific execution thereof against the said party of the second part, his heirs or assigns. . . . If the further encroachment of business on the block be prevented, the plaintiff's premises may remain desirable for residence purposes, and it cannot be said, therefore, that the enforcement of the covenant will harm the defendant without conferring any substantial benefit on the plaintiff."

§ 412. That the property is more valuable for other purposes.

In the absence of any material change in conditions directly affecting the character and use of the property in question, courts will not refuse to enforce the restriction to retain its character as residence property, notwithstanding there may be indications that the property will in the future, be of greater value for business, than for residence, purposes. *Evans v. Foss*, 194 Mass. 513, 80 N. E. 537, 9 L. R. A. (N. S.) 1039 (1907); *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 379 (1909); *Noel v. Hül*, 158 Mo. App. 426, 138 S. W. 364

(1911); *Müller v. Klein*, ... Mo. App. ..., 160 S. W. 562 (1913).

An owner of property is not justified in violating a restriction against erecting a tenement house thereon by the fact that tenement houses have been erected in the neighborhood, and that her land can be used profitably only for that purpose. *Amerman v. Deane*, 57 N. Y. Super. Ct. (25 Jones & S.) 175, 6 N. Y. Supp. 542 (1889).

The mere fact that building restrictions are hurtful to business and restrict the business area of the city in which the land is located, will not prevent their enforcement. *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364 (1911).

§ 413. That complainant has not been damaged by the violation.

Where one of the parties to a valid restrictive agreement has done nothing to estop him from demanding its enforcement and no change has taken place in the conditions which would render the enforcement of the agreement ineffectual to accomplish the purpose of the parties, equity will enforce the terms of the agreement at the instance of such party, regardless of the question whether his property will, in the opinion of others, be damaged by the proposed violation. *Hartman v. Wells*, 257 Ill. 167, 100 N. E. 500 (1913); *Van Sant v. Rose*, 260 Ill. 401, 103 N. E. 194 (1913); *Müller v. Klein*, ... Mo. App. ..., 160 S. W. 562 (1913); *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911 (1898).

Where the complainant is entitled to have a restriction enforced in his favor, proof of special damage is not necessary to the success of his action. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905); *Walker v. McNulty*, 19 N. Y. Misc. 701, 45 N. Y. Supp. 42 (1897); *Collins v. Castle*, L. R. 36 Ch. Div. 243 (1887).

"Nor can the fact that the erection of the building contemplated by the defendants would be no appreciable damage or injury to the plaintiff's premises, affect the rights of the parties. Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived,

because in the judgment of others it is of little or no damage." *Peck v. Conway*, 119 Mass. 546 (1876).

If the defendant relies upon an allegation that complainant will not be damaged by the defendant's deliberate disregard of a restriction, he must make it clear beyond the possibility of doubt that the complainant cannot be damaged. *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611 (1912); *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221 (1906).

"Equity courts will not refuse relief in cases of this kind unless it clearly appears that the violation complained of will be so harmless that the maxim *de minimis* applies." *Henderson v. Champion*, ... N. J. Eq. ..., 91 Atl. 332 (1914).

This is upon the principle that the owner of land selling or leasing it may insert in the deed or contract just such conditions and covenants as he pleases touching the mode of enjoyment and the use of the land. He is not to be defeated, when the covenant is broken, by the opinion of any number of persons that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition. In such cases the court proceeds upon the ground that the grantor or lessor having expressly stipulated that the grantee or lessee shall not do the particular things complained of, the latter is bound to refrain, and the former is not required to accept the opinion of others as to whether he will or will not suffer substantial injury. *Hartman v. Wells*, 257 Ill. 167, 100 N. E. 500 (1913); *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587 (1847).

There may be cases in which it is so clear that the mischief to arise from a breach of covenant would be inappreciable, that the court may decline to interfere on the ground that a mandatory injunction would be out of all proportion to the requirements of the case, and would operate with extreme harshness on the defendant. But, as a general rule, the inconvenience to the defendant will not be taken into consideration. Nor can the defendant be permitted to set up the inconvenience to the public which would arise from his being compelled to perform his agreement. *Kerr, Injunctions* (2nd ed.), p. 432; 2 *High, Injunctions* (4th ed.), sec. 1158.

The case must be free from all possible doubt. It must be

clear that there is no appreciable damage, before the court will, upon this ground, withhold its hand from enforcing the restriction. The mere fact that a breach of the covenant is intended, is a sufficient ground for the interference of the court by injunction.

“A covenantee has the right to have the actual enjoyment of the property, *modo et forma*, as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on him, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be kept, as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract, the court will protect the complainant in the enjoyment of the right he has purchased.” *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206 (1873).

The essential fact in a suit to enforce the observance of restrictive covenants regarding the use of land is, that the covenants inured to the benefit of the plaintiff and were broken in a substantial way by the defendant; not that damage resulted from the breach. It was held sufficient to show that the restrictions were imposed to attract to the vicinity a class of people possessing the means to build and maintain a certain grade of homes and who would constitute a congenial community, as well to keep up the value of the property. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

Indeed, it has been held that the fact that a jury might find only nominal damages in an action for the breach of a restrictive covenant, will more strongly impel equity to restrain a threatened breach of the restriction. *Ludwig v. St. Andrew's Church*, 28 Leg. Int. (Pa.) 213 (1871).

Equity will restrain the violation of restrictive covenants contained in a lease although no substantial injury may result from such violation, and even though the damages sustained might be recovered at law. *Anheuser-Busch Brewing Assn. v. Dwyer*, 150 Ill. App. 315 (1909).

In *Elliston v. Reacher*, (1908) 2 Ch. 374, 77 L. J. Ch. 617, 99 L. T. Rep. 346, affirmed in (1908) 2 Ch. 665, it was said that an injunction restraining the breach of a restrictive cove-

nant may be granted without proof of substantial damage, but where the right is equitable only the court will more readily award damages.

The rights and obligations of parties to restrictive covenants being, even in equity, dependent entirely upon their terms, and not on the amount of injury from any violation of them, parol evidence is unnecessary and inadmissible to show either great or slight injury from such violation. *Perkins v. Codding-ton*, 27 N. Y. Super. Ct. (4 Rob.) 647 (1865).

§ 414. — illustrative cases.

The grantor of property "for the sole use and behoof of a public park" has been held entitled to enjoin a violation of such restriction by a diversion of the property to other uses than that of a park, irrespective of any question of damage. *Bayard v. Bancroft*, ... Del. Ch. ..., 62 Atl. 6 (1905).

The erection of a store building on the rear of a lot, which was subject to a restriction prohibiting any erection thereon except a dwelling house, cannot be said not to be injurious to complainants' property where the building would abut on the lot of one of the complainants for nearly half of its length, and would be but fifty feet distant from the lot of the other complainant. *Erichsen v. Tapert*, 172 Mich. 457, 138 N. W. 330 (1912).

Where the complainant purchased her lot, relying on the general plan as to the building line of the street, erected her own building on the line in compliance with it, and notified defendant to observe the restrictions as soon as her attention was called to their violation, she was entitled to a mandatory injunction without proof of special damage. *Morrow v. Haselman*, 69 N. J. Eq. 612, 61 Atl. 369 (1905).

A suit was brought to enforce a restrictive covenant which prohibited the erection by the respondent of any house within thirteen feet of the line which separated appellant's premises from those of the respondent. It was found by the trial court that the respondent had erected a building in violation of the covenant, but held that in as much as it appeared that appellant had suffered no damage by reason of the violation, that the suit could not be maintained, and the court directed

judgment in favor of the respondent. On appeal it was said by the court: "I do not see how this judgment can be upheld. The covenant has been violated, and this suffices to entitle the complainant to nominal damages at least. I agree that the injury is very slight in view of the right possessed by the defendant Allison to build out the porch, and that there was no case for a mandatory injunction. A judgment awarding nominal damages in favor of the complainant, however, was necessary in order to preserve her rights under the covenant and to enable her to prevent other possible breaches thereof in the future; such as might occur, for example, if the respondent removed the porch and yet attempted to maintain the projecting gable. While the general rule is well established a new trial will not be granted to a complainant unless upon the entire case it appears that he is entitled to nominal damages only, it is equally well settled that this rule does not apply where an allowance of nominal damages is necessary to protect a property interest of the complainant." *Skinner v. Allison*, 54 N. Y. App. Div. 47, 66 N. Y. Supp. 288 (1900).

In an action to enforce the observance of a covenant restricting the buildings to be erected on the premises to first class "private houses," it was urged that there was no depreciation of value to complainant's property due to the occupancy of the building in question as a sanitarium, and that the courts should not on that account interfere. It was said by the court: "If it is a binding and honorable obligation, I can see no reason for a court of equity requiring that it shall have a commercial value before enforcing it. The mere fact that the diversion of residential property to other uses would not impair, or would even increase its value, does not make the violation of a covenant honest or legal. There are other values than those of a property nature entitled to protection. What a mockery it would be for a court of equity to assert that, as substantial damage in money was not shown, the suitor should be sent to a court of law, when he could recover only nominal damages, and as a result have the expense of litigation and no adequate redress. The parties had a right to make the covenant, and have a right to have it protected."

Barnett v. Vaughan Institute, 119 N. Y. Supp. 45, 134 N. Y. App. Div. 921 (1909).

A contract was entered into between plaintiff and a canal company as to the mode of enjoyment of the waters by which both were supplied. The canal company violated the terms of the contract. It was held that it was no answer, upon a bill for an injunction, to say that the acts proposed would not be injurious, or even to prove that they were beneficial to the plaintiff, and that the court would enter a decree for a perpetual injunction although no evidence was given of any actual damage done. *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260 (1852).

In a case in which it appeared that the grantee of land had covenanted not to erect any building on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, and that he had erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, and carried from the foundation up to the roof, it was contended that it was not a case for mandatory injunction, because, although the covenant may be violated, not only was the amount of damage and injury nil, but more than that, what had been done was contended to be actually an improvement to the plaintiff's property. In disposing of this contention the court said: "Of course the plaintiff is the best judge of what will be an improvement to his own property; but I take it now to be the law that if a covenant of this character is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building upon property, then the party who stipulates for and obtains that covenant does so free from being embarrassed by the question whether, if any, what injury or damage is consequent on the breach of the covenant, and that an assign of the benefit of the covenant is in as good a position as the original covenantee." *Manners v. Johnson*, L. R. 1 Ch. Div. 673, 45 L. J. Ch. 404, 24 Wkly. Rep. 481 (1875).

Ordinarily a lessor is entitled to an injunction to prohibit the violation of a restriction in a lease against the selling on the premises of any except a specified kind of beer, without

proof of damage. *Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 110 N. W. 746 (1906).

It has been held that equity will enjoin a lessee who has purchased four-fifths of the reversion, from closing up or incumbering a private gangway laid out between, and for the benefit of the demised premises and an estate adjoining owned by the lessee, without regard to the use or value for use of the gangway, or to the comparative advantage to the plaintiff and disadvantage to the defendant, if such act be in violation of the terms of his lease. *Beckwith v. Howard*, 6 R. I. 1 (1859).

"It is not a question whether the appellee really needs the right or easement which he claims, or whether he may discontinue its use without serious detriment to his remaining land. He reserved or excepted from the conveyance to appellant the right to thus use and occupy the strip in question, and the court will protect his right thereto without stopping to consider whether such right has any substantial money value." *Beck v. Heckman*, 140 Ia. 351, 118 N. W. 510 (1908).

§ 415. — court will consider future as well as present use of dominant owner's property.

It is not alone the present inconvenience or damage to complainant that a court of equity must consider in an effort to ascertain whether or not it is justified in granting injunctive relief against the violation of some property restriction. It may be that at the present time the inconvenience is very slight or the damages merely nominal, considered in view of the present use of complainant's property by him. But some time in the future complainant may desire to make a different use of his property, and would be greatly inconvenienced, and consequently damaged, by reason of the violation of the restriction. It must be remembered that he may have a right to use his property in any lawful manner he sees fit, and that he may also take into consideration, in the exercise of such right, the right he has to have the use of defendant's property restricted. If equity should refuse to enjoin the violation of a restriction merely because at the present time such violation is causing little or no inconvenience, or no damage,

complainant might eventually lose such right by adverse possession on the part of defendant. He might, of course, bring successive suits for damages for violation of the restriction, but it is one of the objects of equity to prevent numerous and vexatious suits concerning the same subject matter.

A covenant to the effect that no building should be erected on a certain lot nearer than three feet to the line separating it from an adjoining lot, is in the nature of a property right, and is enforceable by the person for whose benefit it was imposed regardless of the question of damages. *Supples v. Cohen*, 81 N. J. Eq. 500, 83 Atl. 373 (1912).

"It is also contended," said the court, in the case last cited, "in behalf of defendants that complainants are not materially injured by the encroachment complained of. The projecting bay window extends but seventeen inches and the eaves but sixteen inches over the restricted space. The distance from the nearest part of defendants' building to complainants' building is thirteen feet eight inches. Under these circumstances it is obvious that no considerable damage is being suffered by complainants by reason of the encroachments. But in cases of this class it is unnecessary for complainants to prove that damage is sustained by them. The rights which accrue to complainants under a covenant of this nature are property rights in the restricted space. It may be that at this time the space between the two buildings is adequate to afford such light, air, and view that complainants suffer no present inconvenience; but complainants may desire at some future time to utilize that part of their lot, now vacant, between their present building and the line which separates the two lots. In such case the present encroachment of defendants' building over the restricted space would clearly be operative to materially lessen the enjoyment by complainants of the light, air, and view which they would enjoy with defendants' building located pursuant to the covenant. The continued occupancy by defendants of the restricted space will, in time, ripen into an adverse right. Without the relief afforded by the remedial process of this court complainants could only prevent defendants' use of the restricted space ripening into a right by successive suits at law for damages essentially

nominal in amount. It is for these reasons that a court of equity is obliged to afford relief in a case of this nature even though no considerable damage is presently suffered by complainants."

§ 416. — as depending upon the degree of injury or annoyance.

If the question of the degree of injury done to the plaintiff by the violation of a restrictive covenant was to be open as a ground for denying relief, covenants of the kind would be of little value. *Hall v. Wesster*, 7 Mo. App. 56 (1879).

Where the owner of an estate is bound by restrictive covenants imposed thereon, an injunction will be granted to restrain a breach of such restrictions, without regard to the question of the character or degree of annoyance caused by the breach. *Hall v. Wesster*, 7 Mo. App. 56 (1879).

In the case last cited it was said by the court: "The objection may be founded on the merest whim. Thus, in London, where houses were sold over a tract of fifty-seven acres, and the covenants of the purchasers were that no building erected on the land should be occupied otherwise than as a private residence, the use of a building for a school was held to be a breach of the covenant, and was restrained. . . . The fact that the plaintiff resides at a distance of a quarter of a mile from this cow stable is immaterial. He may desire not to have a cow stable within a quarter of a mile from his house, and he may have bought this tract to gratify that desire. If the question of the degree of injury done to the plaintiff by the violation of a covenant of this character was to be open as a ground for denying relief, covenants of this character would be of little value. The meaning of the agreement that the defendant made is plain. It is not that he shall not maintain a milk dairy that shall be a nuisance, but that he shall not maintain on his lot a milk dairy at all, or any other establishment which shall be a nuisance. If the condition were merely against nuisances, or noxious or annoying trades, it would be a question of degrees; but where a specific thing is totally prohibited, it is not a question of degrees."

§ 417. — benefit instead of damage.

The erection of a business building in the vicinity of the property of a dominant owner in violation of a restrictive covenant might increase the market value of his property, but render it less desirable for the purpose for which he is using it, and intended to use it when he acquired the right to require the observance by other owners in the neighborhood of restrictions on the use of their property. He has a right, which is itself a property right, for which it is presumed he parted with a valuable consideration, to have neighboring property so used as not to interfere with the user of his own for the purposes for which he purchased it. Equity will not refuse to enforce his right under the covenant in such circumstances. Hence, it has been held that the fact that the breach of a restrictive covenant will enhance the value of complainant's property, is immaterial to his right to enforce the covenant. The object of equity in such a case is to enforce the complainant's rights, and not to award him damages. It may be that complainant would prefer the enforcement of the restrictive covenant, in preference to many times the value added to his property by its breach. *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276, 49 Atl. 801 (1901), affirmed in 63 N. J. Eq. 798, 52 Atl. 1130 (1902).

It has been held that a plaintiff may restrain a continuous breach of a restrictive agreement which is beneficial to him and may stand on the very letter of his obligation; for a party may not make a solemn engagement and then disregard it on the plea that no harm will result to the other party. *St. Louis Safe Deposit & Savings Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S. W. 474 (1903).

§ 418. That complainant will not be benefited by enforcement of restriction.

Equity will refuse to enjoin the violation of a restrictive covenant where it is absolutely certain that its observance cannot be of any benefit to the complainant, as where he has no property to be benefited by observance of the restriction. "Benefit," as used in this sense, does not necessarily mean a benefit the value of which can be measured in dollars and

cents. It may mean a right of view, or some other convenience attaching to his property as a matter of right.

Where it appears that an injunction will be of no benefit to the complainant and will be a hardship to the defendant, it will be denied. *Goodhue v. Cameron*, 142 N. Y. App. Div. 470, 127 N. Y. Supp. 120 (1911).

Equity will not enforce the observance of a restriction where its observance will not benefit the complainant and its breach will not injure him. *St. Stevens Protestant Episcopal Church v. Church of the Transfiguration*, 130 N. Y. App. Div. 166, 114 N. Y. Supp. 623 (1909), reversing 59 N. Y. Misc. 560, 112 N. Y. Supp. 403 (1908).

In this respect the court said: "An indispensable element in an action to enforce such a covenant is that its enforcement will benefit the party suing, or that its violation will injure him, and that he is the party for whose benefit the covenant was made. The violation of the present case could not damage the defendant in any legal sense, nor could its enforcement benefit it, for it stands admitted by the pleadings that defendant owns no property in the vicinity of plaintiff's property. As it stands it is a mere naked covenant, inserted in the deed without authority of defendant, supported by no valuable consideration, and appurtenant to no dominant tenement, and is of no benefit to defendant unless it can be used as a weapon *in terrorem* to compel the payment of cash consideration for its release."

It has been held that where the lessee of a building cuts apertures in the floors, removes the cross timbers and flooring, and covers the apertures by trap doors with hinges, for the purpose of giving passage to articles raised by a tackle and fall, even although such acts constitute a violation of the provisions of the lease, equity will not enjoin the lessee from continuing their use, when no substantial injury is shown, but will leave the lessor to his legal remedies. *Browne v. Niles*, 165 Mass. 276, 43 N. E. 90 (1896).

In this respect the court said: "Whether the making of the apertures was an alteration of the building within the meaning of the lease, we do not consider, as a majority of the court are of opinion that, upon the facts shown, the plaintiffs

are not entitled to have the defendants enjoined from using or continuing the openings. Such means of strengthening the floors have been taken as to leave them as strong as ever. The making of the appertures is not shown to have increased the fire risk or the cost of insurance, or to have in any way lessened the value of the buildings, or its safety, or to have injured the plaintiffs. If the making of the appertures was a violation of the terms of the lease, the plaintiffs have not only their action for breach of contract, but their right to terminate the defendants' estate. We are of opinion that, if there has been a violation of the terms of the lease by making the appertures, the plaintiffs should be left to their other remedies, and should not be given an injunction forbidding the defendants to further continue the opening. No substantial injury is shown."

In a New Jersey case the law was stated to be that, "the right to enforce building restrictions and restrictions upon the use of property is now so clearly settled and so generally recognized, especially as to urban and suburban property, that the whole system of such restrictions would be put in jeopardy if the right to enforce them depended upon the decision of the court in each case as to the amount of damage or injury. A purchaser deliberately and intentionally disregarding the restriction should make it clear 'beyond possibility of doubt' that the complainant cannot be damaged." *Cornish v. Wiessman*, 56 N. J. Eq. 610, 35 Atl. 408 (1896).

The defendants sold to complainant one of two adjoining lots owned by them and covenanted that no building should be erected on their remaining lot nearer than three feet from the line separating the two lots. Thereafter the defendants commenced the erection of a building on their remaining lot, and complainant served notice on them forbidding encroachments into the restricted three foot strip of bay windows and eaves, which notice was served before the building was erected, and a bill was promptly filed in equity to enforce observance of the covenant. Defendants, however, completed the building and filed a cross bill to have the covenant corrected. It was held that the complainant could not be deprived of an injunction requiring the removal of so much of the bay win-

dows and caves as projected over the restricted portion of the lot on the ground that the damage that would be suffered by defendants in vacating said space would be disproportionate to the benefit accruing to the complainant. *Supplee v. Cohen*, 81 N. J. Eq. 500, 83 Atl. 373 (1912).

In this case the court said in part: "Defendants have completed their building well knowing of complainant's claim and in the face of the present bill. A preliminary writ of injunction was refused because of a cross bill filed by defendants to reform the covenant. Under these circumstances, defendants cannot now reasonably complain of the loss they may sustain in being compelled to comply with their covenant."

§ 419. Pecuniary loss to defendant.

It is true, of course, that the specific performance of such contracts like those relating to contracts affecting real estate in general rests in the sound discretion of the court, and if the defendant will be subject to great hardship, or the consequences would be inequitable, relief will be denied. But mere pecuniary loss to the defendant from a specific performance of such a restriction will not prevent a court of equity from enforcing it. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

§ 420. Statute of frauds.

It has been held that an agreement not to carry on a particular kind of business on certain premises is not an agreement for the sale of an interest in or concerning said premises, and hence it is not within the statute of frauds. *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218 (1892).

Persons having the right to operate on adjoining premises for the production of petroleum oil and gas, for the purpose of operating their respective properties amicably, to preserve the rights of each with respect to the dividing line between their properties, and to avoid increased expense and probable loss and damage, mutually agreed and promised, orally, not to drill or construct any oil or gas wells on either of said premises within two hundred feet of the dividing line. Held, that

such agreement was not for land or interest in land, but merely an agreement settling and fixing upon the best method of operating the properties, and was not void as being in violation of the statute of frauds. *Ware v. Langmade*, 9 Ohio Cir. Ct. Rep. 85 (1894).

The owner of several lots sold one of them, and in inducing the grantee to purchase represented that the remaining lots were restricted against the erection of any buildings thereon excepting a private residence, like some he had already built, and promised that no other kind of buildings would be erected thereon. No covenant to this effect was put in the contract of sale nor in the deed of conveyance. Held, that such oral promise could not be enforced in equity, because it was void under the statute of frauds. *Norton v. Ritter*, 121 N. Y. App. Div. 497, 106 N. Y. Supp. 129 (1907).

It was held in this case that, although such representations were made to induce the sale, the defendant would not be enjoined from building contrary to such representations under a complaint not alleging fraud, on which the plaintiff relied, whereby he was deceived.

It has been held that a parol agreement not to use premises for the sale of intoxicating liquor is not an agreement not to be performed within one year, within the statute of frauds, when it *may* possibly be so performed. *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218 (1892).

Where the owner of a tract of land sub-divided the same and sold some of the lots therein upon which he imposed uniform restrictions, and agreed orally as a part of the consideration for the purchases to impose similar restrictions upon lots subsequently sold from the remaining portion of the tract, such promise was held to be a contract for the sale of an interest in or concerning land, and such as cannot be enforced in equity in the absence of a memorandum signed by the party to be charged. *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622 (1913).

Concerning this question the court said: "If the front building line, with any language indicating the nature of the restrictions, had appeared on the plan, the defendant would have been estopped to deny an implied grant with covenants

coextensive with the scope of the plan, or, if by any appropriate wording of the deeds, it appeared that the remaining lots as they were sold should be subject to the restrictions, the statute would have been satisfied. The proposed restrictions undoubtedly formed part of the consideration for the purchases, and each plaintiff would have had the right to demand that the defendant insert in the title deed a stipulation or covenant in accordance with the terms of sale.

"To prevent the statutory bar the plaintiffs urge, that as there has been full performance on their part, relief should be decreed or the statute would be converted into a shield for fraud, a result not countenanced by a court of equity. But the mere non-performance of an oral contract, within the statute which is pleaded, as in the case at bar, and where no relation of trust and confidence exists, does not constitute fraud. Nor did the plaintiffs, on whom and not on the defendant the burden of part performance rests where this ground of relief is sought, by taking title, entering into occupation and making improvements on their own estate in reliance upon the parol agreement, acquire any legal or equitable interest in the defendant's remaining land."

§ 421. Statute of limitations.

The statute of limitations does not, of course, commence to run against a cause of action until such cause of action has accrued; hence it does not commence to run against a right of action to enforce observance of a restrictive covenant until there has been a violation of such covenant.

Where the owner of a tract of land laid out a town site thereon and sold lots to purchasers with reference to a plat thereof, and on such plat certain parcels were designated as public grounds, the purchasers of parcels adjoining such public grounds acquired a right to have the same used for that purpose, and they could restrain the proprietor by injunction from diverting the same from such purpose. In such a case the statute of limitations does not begin to run as against the right of such persons until the proprietor does some act inconsistent therewith. *Fisher v. Beard*, 32 Ia. 346 (1871).

§ 422. That the restriction is contrary to public policy.

A grantor of land may incorporate in his deed of conveyance such restrictions as are not contrary to public policy. *Co-Operative Vineyards Co. v. Ft. Stockton Irrigated Lands Co.*, ... Tex. Civ. App. ..., 158 S. W. 1191 (1913). If the restrictions are not for the benefit of some individual or of the public, they are contrary to public policy and void. *Mitchell v. Leavitt*, 30 Conn. 587 (1862).

A restriction in the conveyance of lots in a fine residential district in a city, providing that no buildings should be erected thereon except dwellings and the out-buildings appurtenant thereto, is not invalid as against public policy. *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730 (1911).

In this case it was said by the court: "It is urged by the defendants that the restriction is against public policy, and that consequently a court of equity will not lend its aid in its enforcement; and they cite some cases where, because the restrictions have been against public policy, or were whimsical, intended to place an unreasonable hindrance on the use of land, equity has refused to interfere. But this case is clearly distinguishable. If, in these days of noise and bustling, intrusive activities, a man who has been in confusion all day desires to have a home where, awake or asleep, he can pass his hours in quiet and repose, there is no reason of public policy why, if he can get it, he should not have it. Nor is there any reason why provision should not be made for a collection of such homes in close proximity to each other. No citation of authorities is needed to show that in this commonwealth such a restriction is reasonable and not against public policy."

A restrictive provision that land granted shall not be used for manufacturing or any nauseous or offensive business, has been held not to be contrary to public policy, nor in unreasonable restraint of trade. *Whitney v. Union B. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858).

Speaking for the court in *Whitney v. Union B. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858), Justice Bigelow said: "The objection that the terms of the restrictions are contrary to public policy and in unreasonable restraint

of trade is not well founded. They do not restrict the alienation of land. The owner of the fee can convey it at his pleasure. They do not tend to perpetuity. The person who is entitled to the rights or privileges created or secured by the restrictions can at any time release them. They do not impair the enjoyment of the property. This remains in the respective parties according to their legal rights under the contract and grants; in the same manner as in case of a right of way, where one person owns the land, which he may use and occupy, subject only to the enjoyment of the easement by him who has the right of way over it. Nor do such restrictions operate to impose any unlawful restraint of trade. While they are confined to separate parcels of land of limited extent, they are at most only in partial restraint of trade and do not transcend the legitimate exercise of the right which every owner has to control and dispose of his own estate."

A restriction against the handling of grain on a small parcel of land, which at the time contained no facilities for handling grain, was held not to be unreasonable or contrary to public policy. *Wakefield v. Van Tassell*, 202 Ill. 41, 66 N. E. 830, 65 L. R. A. 511, 95 Am. St. Rep. 207 (1903).

In this respect the court said: "In support of appellants' contention that the condition in this deed is contrary to public policy, and against public welfare, attention is called to the fact that the evidence shows that the building erected upon the premises is a public warehouse, and a subject of great public concern, in the encouragement of which the public has an interest, and that any condition which would tend to restrict such encouragement must necessarily be deemed to be contrary to public policy. At the time the deed to appellant Best was made there was no elevator on the premises, or grain being handled thereon. The condition in the deed became effective upon the delivery of the deed, and the public, so far as it related to the property here involved, could have no interest in a business not then existing thereon. Had the restriction been so broad as to have affected all the available land in the community from being occupied by a warehouse, or had there been at the time the deed was made, a public warehouse upon the premises, and the condition sought to pro-

hibit the use of such as a warehouse, then a different question might be presented for determination, as to the effect of which we express no opinion. The public is no more injuriously affected by a condition prohibiting the use of a small tract of land in a village for the purpose of a public warehouse than it is affected by a condition prohibiting the use of a tract of ground for a school house; and in the illustrations above cited there are numerous businesses of great public concern, but their inhibition from limited areas were not deemed to be inimical to public policy."

An agreement on the part of a lessee of premises to sell no other kind of beer than that manufactured by a designated company, has been held not to be invalid as against public policy. *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305 (1900).

§ 423. That the restriction is in restraint of trade.

While the general rule is that contracts in restraint of trade are void, contracts which impose a limited or special restraint, as not to carry on trade at a particular place or with certain persons, or for a limited reasonable time, are upheld as valid. *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410 (1887).

Restrictions on the exercise of any trade, profession or business, are legal, when they are confined to a limited locality, not unreasonably extensive, and there is a fair and reasonable ground for the restriction. *Robbins v. Webb*, 68 Ala. 393 (1880). An agreement not to manufacture a particular article is not in restraint of trade. *Gillis v. Hall*, 2 Brewst. (Pa.) 342 (1870).

Restrictive covenants which either add to the value or desirability of the land retained or conveyed, and which do not in any way impose an unreasonable restraint on trade or industry, have uniformly been upheld and enforced. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190 (1890).

Meeting the argument that a restriction on a parcel of land was void as being in restraint of trade, the Supreme Court of Ohio said: "This claim can not avail. It is not a contract in general restraint of trade, but is limited in its application to a specific parcel of real property, and forbids its use to

a particular business." *Stines v. Dorman*, 25 Ohio St. 580 (1874).

A deed conveying land for use as a railroad right of way provided that "for the purpose and with the limitation that the rock and material taken therefrom by the party of the second part, or its lessees or assigns, is for railroad purposes," and further, that they are not to "carry on the business for any other purpose," and also containing a provision of forfeiture if the road was not constructed within two years, was held not to be in restraint of trade, but should be taken as qualifying the estate granted, for the benefit of the grantors. *Pavkovich v. Southern Pac. R. Co.*, 150 Cal. 39, 87 Pac. 1097 (1906).

A covenant in a deed not to run or permit to be run any saloon "in any building now owned by me in the same block for a period of five years," is not invalid as being in restraint of trade. *Anderson v. Rowland*, 18 Tex. Civ. App. 460, 44 S. W. 911 (1898).

"Restraints upon trade," said the court, "although limited as to time and place, may be of such magnitude as to injuriously affect the interests of the public, and for this reason be contrary to public policy. But the restrictive covenant contained in the deed before us does not relate to a transaction which affects the public interests, but it simply concerns the private business of the parties, in limiting the use of the property for a definite time. It is a reasonable measure, agreed upon for the protection of one of the parties to the contract, relating to a matter of private concern between them which the public are not interested in, based upon a consideration advanced to the other. In our opinion, the covenant in the deed is legal."

It has been held that a restriction prohibiting the use of premises for the sale of intoxicating liquors is not invalid as being in restraint of trade. *Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363 (1885).

In this case the court said: "There is nothing in the position taken by the defense that the condition tends to the establishment of a monopoly in the business of selling intoxicating drinks, and is thus opposed to public policy. It is not

the policy of this state that every one should sell intoxicating drinks who pleases. On the contrary, heavy taxes are levied and enormous conditions imposed by the state for the express purpose of limiting the number of those who shall sell; and the condition in question is directly in the line of the policy, instead of being opposed to it."

A brewing company as mortgagee advanced a sum of money to enable the mortgagor to build a saloon on the mortgaged premises, and in the mortgage it was provided that the mortgagor shall not, for a period of twelve years, sell upon the mortgaged premises any beer, ale or porter, except that manufactured by the mortgagee. It was held that the restriction was not against public policy as in restraint of trade, and that it might be enforced by injunction. *Cleveland & Sandusky Brewing Co. v. Demko*, 29 Ohio Cir. Ct. R. 102 (1907).

The owner of a public warehouse on a navigable river, conveyed a tract of land adjoining that on which his warehouse was located, and took from the purchaser a penal bond containing a covenant not to allow or permit a warehouse or place for shipping or receiving goods on the conveyed premises. Held, that such covenant was not void as being in restraint of trade. *Robbins v. Webb*, 68 Ala. 393 (1880).

The owner of three hundred and sixty-eight acres of land at a railway junction, sold five and one-half acres thereof, with the exclusive mercantile privileges at, in, and around the junction, including the exclusive right to sell goods, wares, and merchandise; to keep houses of public entertainment and refreshment; to establish and erect warehouses, factories, foundries and shops on the entire tract of three hundred and sixty-eight acres. Held, that such covenants were in general restraint of trade and void. *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676 (1886).

"These covenants," said the court, "cannot be said to be in partial restraint of trade only, and therefore not void, for while they apply to a particular parcel of land, they apply to all business which could be carried on. It would be difficult to devise any trade which would not come within the terms employed—sell goods, etc., warehouses, factories, foundries and shops. They constitute a general restraint of trade, and

cannot be enforced by the court as annexed to the land; they are not for a term, but forever, attempting to bind heirs and assignees; if enforced they establish forever a novel holding of these lands. Tolbert had the right to make this contract for himself, and for his land so long as he held it; indeed, he had the right to bind his estate, real and personal, to these covenants, so long as he held it; but passing out of his hands to a purchaser can he annex these covenants to the land forever in the hands of all future holders? We think not."

§ 424. That the restriction tends to create a monopoly.

A corporation owning a tract of land in a village inserted in its deeds of conveyance of lots a provision for forfeiture of the lots in case intoxicating liquor be sold thereon within thirty years. It appeared that the corporation allowed its secretary to sell intoxicating liquors in the village, and that the conditions were inserted in the deeds to create a monopoly for his benefit of the business of selling liquor in the village. Held, that such conditions would not be enforced. *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 42 N. W. 532, 4 L. R. A. 373, 13 Am. St. Rep. 420 (1889).

In this respect the court said: "I am well satisfied that it would be against public policy to permit the owner of a village plat to insert a condition in the conveyances of his lots that no bread should be sold upon the premises for thirty years in order that he might himself have a monopoly in the village in the sale of bread. Liquor is not a necessity like bread, and is generally regarded as of damage to the general community; but I know of no good reason why a person should be permitted to have a monopoly in selling poison to a community any more than food, unless it be that no other person can be found fit to handle and dispense it. I do not believe, however, that any man or company should be permitted by the law, and aided by the courts, to create a monopoly in himself either in the sale of bread or whiskey. The right to insert such a condition as the one in this case for an honest and beneficial purpose cannot be denied, and is within the public policy of this state. But courts will not enforce such a condition, inserted for a dishonest purpose and to the end that

the grantor may thereby obtain a monopoly in any business and all others be restrained therefrom. And there can be no difference in this regard whether the business, so sought to be centered in one person in a community, is one acknowledged by everyone to be of great benefit to mankind, or one regarded by many good people of detriment to the community, provided both are lawful. And certainly one cannot ask a court of justice to enforce such a condition as this against a person selling liquor otherwise lawfully, that he may reap the benefit of unlawful sales. Courts will not enforce forfeitures of estates for any such purposes."

K. was the owner of land located in L., a portion of which contained a quarry. He conveyed to F. the quarry with the following covenant: "And I do for myself, my heirs, executors, and administrators, covenant with the said F., his heirs and assigns, that I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said L." Subsequently A. became possessed of the quarry, and B. of the surrounding land referred to in the covenant. A. brought suit in equity to restrain B. from quarrying stone on his land. It was held that the suit could not be maintained. *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885).

In the case last cited the court said: "The principle of policy applied to affirmative covenants applies also to negative ones. They must 'touch or concern' or 'extend to the support of the thing' conveyed. They must be 'for the benefit of the estate.' Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or burden. The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon and an easement to have a quarry left unopened, the answer is, that, whether a dif-

ference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in an indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

“Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly—an easement not to be competed with—and in that interest alone a right to prohibit an owner from exercising the usual incidents of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, you can do it in all; and we think that, if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it should be treated as merely personal in its burden.”

§ 425. That the restriction is unreasonable.

A uniform building restriction imposed on all lots in a subdivision, and providing that no residence should be erected on any lot costing less than three thousand dollars, is reasonable and enforceable. *Highland Realty Co. v. Groves*, 130 Ky. 374, 113 S. W. 420 (1908).

Where a gun club conveyed a portion of its lands for building lots subject to the restriction against the use of fire arms thereon, it was held that such restriction was not unreasonable or void as restricting the right of a citizen to bear arms. *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 107 Pac. 625 (1910).

§ 426. That the violation is immaterial.

Where violations are unimportant and so little violative of the spirit of the restriction in question, they will not be considered by the court, where to enjoin them would require ex-

tensive alterations in the buildings to make them conform exactly to the covenant.

Under a covenant requiring twenty feet of open space between the houses of complainant and defendant, the overhanging of complainant's eaves by a little more than two feet, will not be enjoined where they are twenty-four feet above the ground, nor will the defendant be enjoined from maintaining his house slightly over the restricted line at a distance of fifteen feet above the ground, or from maintaining a cellar-way with slanting doors slightly over the line. *Smith v. Spencer*, 81 N. J. Eq. 389, 87 Atl. 158 (1913).

§ 427. That violation is not offensive or a nuisance.

It is no defense in an action brought to enforce the observance of restrictive covenants in a lease that the use covenanted not to be made, and which the defendant is making, is not a public or private nuisance; nor that such prohibitive use will not deteriorate the premises in value; nor that the lessees have expended large sums with a view to such prohibited use, which they will lose if not permitted to violate their covenant. *Dodge v. Lambert*, 2 Bosw. (15 N. Y. Super. Ct.) 570 (1858). Nor is the court to enter into a comparison and permit a tenant to carry on some trades as less offensive than others, where the covenant prohibits the former. *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587 (1847).

§ 428. When nuisance will not be enjoined.

Where a lessor leases his premises with full knowledge of the character of the business of the lessee to be carried on in such premises, and which business is conducted in view of the arrangement of the building in a manner that is no worse than is necessarily incident to the business, but the effect of the business is to create a nuisance on the premises, the lessor will not be granted an injunction to prohibit the continuance of the nuisance, if the effect of the injunction would be to compel the lessee to discontinue business or make expensive alterations in the building, but the lessor will be left to his legal remedies. *Browne v. Niles*, 165 Mass. 276, 43 N. E. 90 (1896).

In the case last cited the court said: "The report requires us to assume that a nuisance exists upon the premises. Assuming further in favor of the plaintiffs that the nuisance is due, not to the effects of the tide, but to the effects of the business carried on by the defendants, we are of opinion that the plaintiffs are not entitled to have the defendants enjoined from permitting or continuing a nuisance upon the premises. The plaintiffs made the lease with full knowledge of the defendants' business, which was then being carried on on the same premises, and with full knowledge of the uses to which the premises would be continued to be put, and the actual use of the premises is found to be no worse than is necessarily incident to the business which was contemplated and expected when the lease was made. If the business is carried on, the continuation of the nuisance can only be prevented by the reconstruction of the basement floor, laying a concrete floor underneath, and concreting the sides to a height to keep out the tide. Thus the effect of an injunction would be to compel the defendants either to stop the business, to do which the plaintiffs knew the building was hired, or to make important and expensive alterations in the premises. Without the aid of an injunction the plaintiffs may terminate the lease if the present nuisance is a breach of it. There is no express covenant in terms that the defendants will not suffer or commit a nuisance upon the premises. There is a covenant that they will not make nor allow to be made any unlawful, improper, or offensive use thereof. But this ought not to entitle the plaintiffs to stop the use of the building for the very business both parties expected it to be used when the lease was made."

§ 429. That the restriction is vague and uncertain.

Where restrictive covenants are vague and uncertain, or where the right to their enforcement is doubtful, equity will not enforce their observance. *Meaney v. Stork*, 80 N. J. Eq. 60, 83 Atl. 492 (1912), affirmed in 81 N. J. Eq. 210, 86 Atl. 398 (1913); *Fortesque v. Carroll*, 76 N. J. Eq. 583, 75 Atl. 923 (1910); *Sailer v. Podolski*, 81 N. J. Eq. 327, 87 Atl. 458 (1913); *Ronan v. Barr*, ... N. J. Eq. ..., 89 Atl. 282 (1913); *Underwood v. Herman & Co.*, ... N. J. Eq. ..., 89 Atl. 21

(1913); *Henderson v. Champion*, ... N. J. Eq. ..., 91 Atl. 332 (1914).

Where the right of a complainant to relief by the enforcement of a restrictive covenant is doubtful, to doubt is to deny. *Howland v. Andrus*, 81 N. J. Eq. 175, 86 Atl. 391 (1913), reversing 80 N. J. Eq. 276, 83 Atl. 982.

The use of premises sought to be enjoined must be clearly within the provisions of the restrictive covenant or agreement before injunction will issue. *Clark v. Jammes*, 87 Hun 215, 33 N. Y. Supp. 1020 (1895).

A corporation leased a tract of land and at the time of the execution of the lease entered into an agreement with the lessor that the following by-laws or covenants should be fully complied with: "(1) No land to be sold or leased without a pledge to build speedily, design of buildings to be approved by directors. (2) Buildings to be twenty feet back of building line, and fronts to be ornamented with shrubbery and flowers. (3) No nuisances, factories, etc., to be permitted; clause in deed to this effect. (4) To regulate other proceedings." It was held that the covenant "to regulate other proceedings," was too vague to be enforced in equity. *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 286, 1077, 36 L. R. A. 393 (1895).

A restrictive covenant providing that, "all buildings and additions thereto which the said party of the second part, his heirs and assigns, shall erect or cause to be erected at any time now or hereafter will be set back on a line with the other buildings on the same side of the aforesaid avenue and street," was held to be ambiguous and not to be enforceable in equity against one desiring to construct a business building on the street line after the locality had changed from residential to commercial, and nearly all the buildings devoted to business were constructed on the street line. *Camovito v. Matthews*, ... N. J. Eq. ..., 88 Atl. 187 (1913).

In this case the court said: "The covenant is at least vague and ambiguous. Courts of equity do not aid one man to restrict another in the uses to which he may put his property, unless the right to such aid is clear, and, in cases when the

right of complainant to relief by the enforcement of a restrictive covenant is doubtful, 'to doubt is to deny.' "

A covenant not to erect any building other than "a dwelling house and its appropriate buildings" will not be enforced against one who proposes to erect a three story apartment house, where it appears that the indefinite and uncertain language of the covenant had been given a practical interpretation by prior grantees, who were allowed to erect two family houses of three stories and other two family houses on a single lot. *Underwood v. Herman & Co.*, ... N. J. Eq. ..., 89 Atl. 21 (1913).

In referring to the uncertainty of the language used in the covenant in question, and its interpretation by the several owners of the land, the court said: "In this manner language of an uncertain and indefinite character received a practical interpretation upon land by the grantees, presumably with the acquiescence of the grantors, and prior grantees. This practical interpretation of the covenant which the learned Vice Chancellor has found to exist emphasizes the contention that the variations and departures from the strict terms of the covenant are due to its uncertainty and indefiniteness, factors which bring the case within the application of the doctrine of the cases to which we have referred, and which require the reversal of the decree appealed from."

A corporation owned a tract of land laid out into streets and avenues, the avenues running at right angle to the streets, imposed a uniform building line "on the main avenues," and conveyed lots subject thereto. In an action to enforce the observance of such building line, it was contended by the defendant that this description of the highways to which the covenant was intended to apply was illusory, vague and uncertain, because no one could tell what was meant by the word "avenues," or by the words "main avenues." It was held, however, that the word "main" was mere surplusage and that the restriction referred to the avenues. *Newbery v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752 (1909).

Complainant purchased a lot fronting on Wildwood avenue and covenanted in the deed that the building to be erected thereon should "be so located that the front line thereof shall

not be nearer than sixty feet to the street line measured at right angles thereto." The grantor in the deed covenanted that he would not "convey any of the adjoining lots except by deed containing the same restrictions as above recited." Defendant purchased from the same grantor two lots at the corner of Wildwood avenue and Park street fronting on Park street, and which abutted on the rear of complainant's lot. Defendant had actual notice of the covenants existing in the deed of conveyance of the lot to complainant. Complainant had actual notice that defendant's lot fronted on Park street. The question of whether or not the covenant was violated by defendant by his erecting a building nearer than sixty feet to Wildwood avenue was held not to be so clear that a court of equity would aid in its enforcement. *Howland v. Andrus*, 81 N. J. Eq. 175, 86 Atl. 391 (1913), reversing 80 N. J. Eq. 276, 83 Atl. 982.

Whether or not a restriction that "not more than one building shall be erected upon a single lot" is violated by the erection of a building whose exterior walls, foundation, and roof constitute but one building, but whose interior arrangement and entrances show that it is to constitute "two residences," is not so clear that a court of equity will aid in its enforcement. *Fortesque v. Carroll*, 76 N. J. Eq. 583, 75 Atl. 923 (1910).

A covenant providing against the erection of "any house of the character or description commonly known as 'tenement houses'" was held not to be so free from doubt as to authorize a preliminary injunction in an action to restrain the erection of "flats" on the land in question. *Boyd v. Kerwin*, 15 N. Y. Supp. 721 (1891).

Deeds to lots in a restricted territory provided that the building line was established at an average of thirty feet from the line of a certain avenue, and that the grantees should conform to that line, and that "no building or any part or portion thereof shall at any time be erected or placed upon the space between said building line and said street, nor shall any projection be permitted to extend into or encroach upon said space, except that the steps and platform in front of the main door may extend over said building line not to exceed

eight feet." It was held that the restrictions were not void for uncertainty, and that their validity was not affected by the fact that there were some variations among the blocks in the restrictions relating to the value of the improvements to be made. *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159 (1911).

§ 430. Expiration of restriction during pendency of suit or soon thereafter.

In an action to enjoin the violation of a building restriction, where the building has already been erected, and the restriction terminates, by reason of the expiration of the time stipulated for it to run, during the pendency of the suit, the court will not order the removal of the building, but it may award damages. *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577 (1905).

In this regard the court in the case last cited said: "If, in truth, the restrictions have lapsed, there is no cause to alter the building as it stands; or it might immediately be converted into flats without violating the covenant. When restrictions have expired courts refuse to order the removal of buildings which were erected in violation of them while they were in force. This is for the reason that another building like the one removed might be erected immediately. If the restrictions have lapsed, the plaintiffs may be entitled to redress for damages sustained from the construction and maintenance of the flats, redress which a court of equity would have power to award, as essential to complete justice, in the present case wherein the plaintiffs have shown an equity."

A landlord may enjoin a violation by his tenant of a restriction upon the use of the premises, although the term for which the premises were demised has nearly expired. *Hovnanian v. Bedessern*, 63 Ill. App. 353 (1896). "Considering the usual time required, or at least consumed, to dispose of a chancery case," said the court, "should a bill be entertained in a case that in six months will have nothing in it? We hesitate, but hold that the bill should not have been dismissed because of the short term of the lease."

The fact that restrictions sought to be enforced would

terminate in 1925 would have no effect upon a suit brought in 1914. *Thompson v. Diller*, 146 N. Y. Supp. 438 (1914).

§ 431. That defendant was ignorant of restriction.

That the owner of land is ignorant of the fact that his land is subject to restrictions is no defense in an action to enjoin him from the violation of such restrictions. In an action to compel defendant to remove a structure which he had erected on his land in violation of a building restriction, it appeared that defendant had received the land by descent and at the time he erected the structure in question he was not aware of the restrictions, which were in the deed to his ancestor. It was urged by the defendant that a decree for a mandatory injunction should not issue because he was not aware of the restrictions in the deed to his father. The court, however, held that, as he saw fit to act in ignorance of his own rights, and without considering the rights and interests of the residents of the neighborhood, the financial loss should be borne by him and not by the complainants, who were in no way responsible for it. The court stated that the relief granted is such as is usual in similar cases. *Allen v. Barrett*, 213 Mass. 36, 99 N. E. 575 (1912).

§ 432. That there is no legal liability.

The action of courts of equity in suits to restrain the violation of restrictions is not limited by rules of legal liability, does not depend on legal privity of estate, or require that the party invoking the aid of the court shall come in under and after the covenant. A covenant or agreement restricting the use of any lands or tenements in favor of or on account of other lands, creates an easement, and makes one tenement, in the language of the civil law, servient, and the other dominant, and this without regard to any privity or connection of title or estate in the two parcels or their owners. All that is necessary is a clear manifestation of the intention of the person who is the source of title to subject one parcel of land to a restriction in its use for the benefit of another, whether that other belonged at the time to himself or to a third person, and sufficient language to make that restriction perpetual. *Johnson v. Robertson*, ... Ia. ..., 135 N. W. 585 (1912).

§ 433. That title to property in question is not in defendant.

The fact that the title to restricted land is not in the defendant, is no defense to an action against him to restrain him from the violation of such restrictions. *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961 (1889).

§ 434. That the improvements made in restricted territory are of little value.

Where the owners of a residential addition to a city inserted covenants in the deeds to all the lots disposed of which established a building line and prohibited the sale of intoxicating liquors thereon, the fact that improvements made in the addition were of little value does not impair the efficacy of the restrictive covenants; the spirit of the restrictions being to establish a residential district. *Fete v. Foerstel*, 159 Mo. App. 75, 139 S. W. 820 (1911).

§ 435. Effect of dismissal of suit for injunction on subsequent action for damages.

Where a defendant has violated a restrictive agreement, and suit has been brought seeking an injunction to restrain him therefrom, and such suit is dismissed, it should be without prejudice to an action at law to recover damages for the breach of the covenant. *Goodhue v. Cameron*, 142 N. Y. App. Div. 470, 127 N. Y. Supp. 120 (1911).

§ 436. That a majority of property holders have consented to the violation.

It is no defense to a suit to enforce the observance of a restriction, that a majority, or nearly all, of the owners of lots in the restricted tract have given their consent to the violation. *Zipp v. Barker*, 40 N. Y. App. Div. 1, 57 N. Y. Supp. 569 (1899), affirmed in 166 N. Y. 621, 59 N. E. 1133 (1901).

§ 437. Release of restrictions.

A general release of all the grantor's estate, right, title and interest, discharges the land from a restriction not to build in a particular manner, *Davis v. Oberteuffer*, 5 Clark (Pa.) 413 (1855), provided such restriction was imposed for the benefit of the grantor only.

The owner of a tract conveyed a portion thereof to one Gelston, who covenanted for himself and all persons claiming under him that "these presents are upon the express condition that no buildings shall be erected upon the premises for the purpose of prosecuting any business, trade, calling or manufacture prohibited by the existing laws of the state of Maryland or the ordinances of the city of Baltimore, or which shall cause or produce a nuisance injurious or prejudicial to the adjacent lots, or calculated to prevent the beneficial use and occupation of the same, and that no such excepted business, trade, calling or manufacture shall be prosecuted or carried on within the premises unless the consent of the Canton company shall first be had and obtained therefor, under penalty of rendering this indenture and all parts thereof void." Subsequently the grantor conveyed other parcels of land in the vicinity without restriction. Gelston afterwards subdivided his tract and sold parcels thereof to different persons, to whom the original grantor (the Canton company) executed a deed of release or quit claim of its title or right to enforce in any manner the covenant mentioned. Held, that the restriction in question could only have been enforced by the original grantor, and that since it had released its right, the restriction was no longer binding on the property. *Safe Deposit & Trust Co. v. Flaherty*, 91 Md. 489, 46 Atl. 1009 (1900).

The owner of a building conveyed a strip of land three inches wide with the right to use his party wall to the owner of adjoining premises, in consideration of the latter covenanting, which covenant was stipulated to run with the land, that she would not allow the building to be erected on her land to be used for saloon purposes for a specified period of time. Subsequently a dispute arose as to the title to a portion of the grantee's lot, and the grantor executed and delivered to her a quit claim deed of her entire lot, including that portion in dispute, without any reference to the restriction. Held, that the effect of the deed was to annul the restriction, and evidence of the conversations and acts of the parties prior to the making of the deed relative to the restriction, was inadmissible. *Uihlien v. Matthews*, 172 N. Y. 154, 64 N. E. 792

(1902), reversing 57 N. Y. App. Div. 476, 68 N. Y. Supp. 309 (1901).

Referring to the quit claim deed, the court said: "That grant conveyed to the defendant every possible right, interest or claim that the grantor had or could assert against the premises, in law or equity. The plain legal effect of that deed was to release or annul the restriction in favor of the grantor against the property. The continued existence of the servitude would be inconsistent with the terms of the grant and contradictory of its entire scope and meaning, and so we think that upon the delivery of that deed the easement and servitude ceased to exist."

The owner of land conveyed a lot with a condition in the deed that the grantee, his heirs and assigns, should not, at any time, manufacture, or sell, to be used as a beverage, any intoxicating liquor, or permit the same to be done on the premises, unless the grantor should sell other land in the same village without such restriction, or should himself manufacture or sell, or permit on his lands in the same village to be manufactured or sold, such liquor to be used as a beverage. Held, that the sale of a glass of liquor upon another lot in the village, conveyed by the same grantor, in the presence of the grantor, and without objection by him, was not such a permission by him as came within the meaning of the deed. *Plumb v. Tubbs*, 41 N. Y. 442 (1869).

Referring to this question, the court said: "There is no merit in the last objection, that Ferris sold one glass of ale to a third party in the presence of the plaintiff. If it had been stated that he had sold it with his assent, the case would have been different. In some circumstances the bodily presence of the plaintiff might be evidence of an assent to the sale. In others it would have no such effect. At the most, it was evidence from which the jury could have inferred an assent. If the defendant had desired to give it such effect, he should have submitted it to the jury for their decision."

Where, however, restrictions and conditions are placed on parcels of land for the benefit of purchasers and their grantees, they cannot be released to a purchaser or his grantee without the assent of all the purchasers or their grantees, for whose

benefit they were imposed. *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122 (1894); *Raynor v. Lyon*, 46 Hun (N. Y.) 227 (1887).

Where the deed to a lot contains a restrictive covenant in favor of another lot, such restriction cannot be changed by succeeding grantors of the servient lot without the consent of the owners of the dominant property. *Hansell v. Downing*, 17 Pa. Super. Ct. 235 (1901).

The owner of two lots on opposite sides of a street in Atlantic City, conveyed one with certain restrictions as to the location of any building or improvement thereon. Subsequently she, and other property owners, including the grantors of the defendant company, granted the city the right to construct a boardwalk across their properties, they reserving the right to connect their respective buildings with the boardwalk. Held, that this reservation clause merely had the effect of giving the grantors the right to connect their buildings with the boardwalk without further consent from the city, and that it did not affect, by release or otherwise, the rights and obligations of the parties to the restrictive clause contained in the deed to the lot in question. *Hemsley v. Marlborough House Co.*, 68 N. J. Eq. 596, 61 Atl. 455 (1905), reversing 65 N. J. Eq. 167, 55 Atl. 994 (1903).

§ 438. Effect of breach of the terms of a release.

A deed to land contained a covenant on the part of the grantees that the premises should not be used for hotel purposes for a period of two years. Subsequently this covenant was waived in writing by the grantor, with the following condition: "Provided the maximum rate of said hotel shall be one dollar per day, and provided a greater sum is charged this agreement shall be null and void, and the clause in said deed shall be binding on the owners of the above described property." Held, that a violation of the condition in the waiver by a second grantee had the effect of rendering the original grantees liable on their covenant in the deed. In other words, the effect of the breach was to charge not only the second grantee, but also the original grantees to the restrictive cove-

nant. *Wittenberg v. Mollyneaux*, 55 Neb. 429, 75 N. W. 835 (1898).

§ 439. License from state to build as authority to violate restriction.

Where the owner of land bordering on the ocean granted a right of way thereon, and covenanted not to build on the ocean side thereof except a pier of certain dimensions and for a prescribed use, the fact that he procured a license thereafter from the state to build a pier did not justify him in violating the covenant. *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822 (1901). The covenantor was prohibited from building anything on the ocean side of the right of way except according to the reservation of the right to build the pier, whether on his own land or on land owned by the state and on which he was authorized by the license to build.

ADDENDUM.

Restrictions as to the Use of Real Property for Billboards.

The case of *Cusack v. City of Chicago*, in the Illinois Superior Court, was decided in December, 1914, while this work was going through the press. It is of so much importance that it is here printed entire. The full title is *The Thomas Cusack Company*, appellee, v. *City of Chicago et al.*, appellants.

Mr. JUSTICE VICKERS delivered the opinion of the court:

The Thomas Cusack Company, a corporation, filed a bill in equity in the Superior Court of Cook County against the City of Chicago, the mayor of the city, and other officials, to restrain the enforcement of an ordinance regulating the erection and maintenance of billboards in residence blocks in said city. The bill alleges that the complainant is engaged in the business of outdoor advertising in Chicago and elsewhere, and that it maintains billboards on private property in residence blocks without having complied with an ordinance of the City of Chicago passed and in force December 5, 1910. The section of the ordinance the validity of which is involved is as follows:

"707. Frontage consents required.—It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, without first obtaining the consent, in writing, of the owners or duly authorized agents of said owners owning a majority of the frontage of the property, on both sides of the street, in the block in which such billboard or signboard is to be erected, constructed or located. Such written consents shall be filed with the commissioner of buildings before a permit shall be issued for the erection, construction or location of such billboard or signboard."

[Allegations of bill for injunction.]

The bill alleges that a large number of billboards have been erected since the passage of said ordinance without complying with its provisions in regard to obtaining the consent of the majority of the property owners fronting on both sides of the street in the blocks in which such billboards have been erected and maintained; that the occupation of lots with these billboards is under leases made with the owners of the lots, and that the complainant has made contracts with its customers for the maintenance of said boards and the display of advertisements thereon. The bill alleges that the section of the ordinance above set out is invalid for the reason that it is discriminatory and unconstitutional, in that it deprives property owners of their property without due process of law, in violation of the constitutions of the United States and of the State of Illinois. The bill also alleges that the billboards erected in violation of said ordinance do not in any way interfere with the public health, safety, welfare or comfort, and alleges that the City of Chicago has no power to pass said ordinance, and that if said city has power to pass any ordinance on the subject of billboards, the one in question is void for unreasonableness. The prayer is for a perpetual injunction against the city and its officials enjoining them from the enforcement of said ordinance.

[The answer.]

The defendants below answered the bill, in which the alleged invalidity is denied. The answer alleges that the ordinance was regularly passed by the city council pursuant to express legislative authority, and that it is a proper exercise of the police power of the City of Chicago and the State of Illinois. The answer sets up that billboards are dangerous to the public health, safety, morals, welfare and comfort in that they afford protection to disorderly persons, who conceal themselves behind them; that the space behind billboards is used in such manner as to create nuisances by reason of the shelter and protection afforded by said billboards; that the maintenance of such billboards causes the accumulation of inflammable material, thereby increasing the danger of fires. The answer

denies that the ordinance is invalid for any reason, and particularly that it is not invalid because discriminatory, oppressive or unreasonable.

The cause was heard upon evidence produced in open court, and a decree was entered in accordance with the prayer of the bill, perpetually enjoining the enforcement of the ordinance. The defendants below have prosecuted an appeal to this court.

[Power of city to enact ordinance.]

The sole question involved for our consideration is the validity of Section 707 of the municipal code of Chicago, which is quoted above. The contentions in support of the decree are, first, that the municipality had no power to pass the ordinance in question; and second, conceding that the city has the power to pass proper regulatory ordinances in regard to the erection and maintenance of billboards, the ordinance here involved is void because it is not a proper exercise of such power, in that it is oppressive and unreasonable.

This court held in *City of Chicago v. Gunning System*, 214 Ill. 628, that under paragraph 66 of section 1 of article 5 of the Cities and Villages Act, relating to the police power, and under paragraph 75 of said section, relating to nuisances, a city has power to enact and enforce reasonable regulations respecting billboards within the corporate limits, whether upon public streets or private property. On page 639 this court summed up its view upon this question, as follows: "We think it clear that either under paragraph 66 or 75, *supra*, full power and authority are conferred upon cities, towns and villages to regulate the construction and use of billboards within their corporate limits, provided the regulation is not unreasonable. Moreover, paragraph 78 of section 1, article 5, confers upon cities and villages the right 'to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.' No argument need be advanced that the structures described in the bill before us may become a menace to the safety of the public, and hence the subject of control and regulation. They may be erected in such a manner as to be dangerous to the public by falling or being blown down, or

constructed of such materials and dimensions as to be dangerous, or placed upon buildings or other structures in such a manner as to endanger the life and limb of the citizen, or erected within the fire limits in such proximity to buildings as to increase the danger of loss by fire, or so as to obstruct the view of railroad crossings and thus endanger life by accident, or have printed or displayed upon them obscene characters tending to demoralize and injure the public morals. If boards are erected in violation of any of these public rights or interests, and of others which might be mentioned, there is ample power within the statute to regulate them, provided such regulations are reasonably necessary for the protection of the public health, morals or safety. Nor will the mere fact that such structures are placed upon private property, and not on the public streets, protect those owning or using them against such reasonable regulations."

While the particular ordinance that was involved in the *Gunning System* case was held invalid, the decision did not rest on the want of power in the municipality to pass reasonable ordinances upon that subject. To remove any doubt as to the existence of the power, the legislature in 1912 passed an act providing "that the city council in cities and the president and board of trustees in villages and incorporated towns shall have the power to license street advertising by means of billboards, signboards and signs, and to regulate the character and control the location of such billboards, signboards and signs upon vacant property and upon buildings." (Hurd's Stat. 1913, chap. 24, par. 696.) Whether this statute enlarges the powers which existed, as declared by this court in the *Gunning System* case, or not, it is not necessary to inquire. It is at least a clear legislative declaration which unmistakably manifests an intention that the subject of billboards and billboard advertising shall be subject to municipal regulation.

[Reasonableness of ordinance.]

The existence of the power to legislate upon the subject of billboards being established, the next inquiry is whether the ordinance in question is a reasonable exercise of such power.

Upon the question of the reasonableness of the ordinance much evidence was introduced by the appellants showing the detrimental results that have followed the erection and maintenance of billboards in the residence districts. It was shown by the testimony that fires had been started from the accumulation of combustible material that had lodged against the base of billboards. As bearing upon this question and as affording a justification for requiring frontage consents in residence districts, evidence was offered to show that the residence territory of the city is not so well protected with fire extinguishing apparatus as is the business district. This evidence was objected to and the court sustained the objection. In this the court erred. When the reasonableness of an ordinance is under investigation as a question of fact, any pertinent matter which may reasonably be supposed to have influenced the enactment of the ordinance would seem to be proper evidence. If, as a matter of fact, the erection of billboards would increase the hazards of fire in residence districts, that fact, together with any other attending circumstance which would show that fires in residential districts would be more disastrous to life and property and that their extinguishment would be attended with greater difficulties than in other districts, would have a direct bearing upon the reasonableness of the requirement for frontage consent. *Welch v. Swasey*, 214 U. S. 91.

Appellants also offered to show that billboards offered a protection to disorderly and law-breaking persons and that residence districts are not afforded as full police protection as other districts in the City of Chicago, and the court refused to hear this evidence, and in this the court also erred. It did, however, appear from the testimony that women and children are on the streets, unaccompanied, in larger numbers and more frequently in residence districts than in other places, and that the crimes against women and children the most frequent are indecent exposure and offenses against the person. It is shown by the testimony that the two elements contributing to crime in cities are, in the order of their importance, first, absence of police; and second, darkness. It

was shown by appellee that in some instances lights were maintained upon the front surface of its billboards, but in answer to this it was shewn that the space behind the boards remained dark, and that the rear was even darker than it would have been if there were no lights at all. It was shown that nuisances were permitted to exist in the rear of surface billboards, and physicians testified that deposits found behind billboards breed disease germs, which may be carried and scattered in the dust by the wind and by flies and other insects. It was shown that dissolute and immoral practices were carried on under the cover and shield furnished by these billboards. The answer made to all this is, that any other structure or building which would afford a like screen from view would produce similar results, and herein is found the basis for the contention that the ordinance is discriminatory; but we are of the opinion that the surface billboard is unlike, in several particulars, structures that are erected for other purposes, such as fences, barns and other out-buildings that may be used in connection with a residence. This argument was made in the case of *Gunning Advertising Co. v. City of St. Louis*, 239 Mo. 99, and we quote the answer of that court to this argument, as follows: "While that is possible yet it is not probable. Nor does the erection and maintenance of a building or a fence along the lines of private property bordering upon public streets have the natural tendency to create any such nuisance as those mentioned. Buildings and fences are erected for the purpose of enclosing grounds and excluding therefrom strangers and trespassers, and common experience teaches us that they are effectual for that purpose, which is inconsistent with the idea that they promote and harbor nuisances, as billboards do, which rarely, if ever, enclose the grounds upon which they stand. That is not the purpose of their erection. Generally they are built along only one end or side of a lot or plot of ground, but occasionally upon two sides, and in rare instances upon three, but I have never seen or heard of a lot being enclosed upon all four sides by billboards. The end of the lot fronting upon an alley is almost invariably left open, for the simple reason that the alley is

not conspicuous in the public eye, and for that reason it would be useless to display advertisements at such places where they could not be seen."

Under the state of facts shown by the evidence here, we cannot agree with the court below that the ordinance in question is void for unreasonableness. Before the court will be justified in declaring the ordinance invalid the unreasonableness should be made to clearly appear. It should be manifest that the discretion reposed in municipal authorities has been abused in the exercise of the power conferred. (*Chicago and Alton Railroad Co. v. City of Carlinville*, 200 Ill. 314, and cases there cited.) The case of *City of Chicago v. Gunning System, supra*, is clearly distinguishable from the case at bar. The ordinance there held unreasonable and void was general in its terms and prescribed restrictive conditions in regard to the erection and maintenance of billboards, and made no exception whether the billboards were in a thickly settled part of the city or in an open block or field. Mr. Justice Wilkin said on this point in the *Gunning System* case: "It must be apparent to all reasonable minds that provisions which are necessary in one of such cases would be wholly unnecessary and unreasonable in others, and that a provision might be a reasonable police regulation in the one case and in one locality which would be wholly unreasonable under other circumstances in another locality. This ordinance is, however, without qualification or limitation applicable to signs and billboards alike in all portions of the great city of Chicago, applicable alike to every portion of its extended territory. We do not hold that this ordinance is so unreasonable as to be void if it were limited to particular districts of the city." In *Haller Sign Works v. Training School*, 249 Ill. 436, we held an ordinance which prohibited the erection of any character of signs for advertising purposes within five hundred feet of any public park or boulevard, illegal and void, for the reason that it did not tend to promote the safety, health, comfort or general welfare of the public but was manifestly passed solely from æsthetic considerations. The ordinance here under consideration is not open to the objections that were apparent upon the face of the ordinance in the *Haller Sign Works*

case, and the evidence in the record clearly distinguishes this case from the *Gunning System* case.

[Validity of frontage consents requirement.]

The ordinance is not unreasonable or oppressive because it requires the consent of a majority of the owners of property, within certain limits, on both sides of the street where such billboards are to be erected. In respect to occupations or structures the location and maintenance of which are subject to regulation under the police power of the municipality, a requirement of frontage consents of property owners, within reasonable limits, is a proper mode of exercising the power of regulation vested in the municipality. Ordinances of this general character have been upheld in regard to livery stables in *City of Chicago v. Stratton*, 162 Ill. 494, in regard to dram-shops in *Swift v. People*, 162 *id.* 534, and in respect to garages in the late case of *People v. Ericsson*, 263 *id.* 368.

It follows from the views herein expressed that the court erred in entering a final decree perpetually enjoining the enforcement of section 707 of the municipal code of Chicago.

The decree of the Superior Court is reversed and the cause remanded to that court, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

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